State of Montana

DETENTION & SHELTER CARE PLAN

1976

SUMMARY OF RECOMMENDATIONS
BUDGET
PROPOSED CHANGES IN THE MONTANA YOUTH COURT ACT

Office of the Governor's

Budget & Program Planning

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TABLE OF CONTENTS

RECOMMENDATIONS OF THE DETENTION AND
SHELTER CARE PLAN

The following recommendations presented on the complete Detention and Shelter Care Plan of 1976. Three asterisks (***) indicate that the recommendation is the basis for proposed legislation as presented in the next section of this Chapter.

***1. "Detention" is the temporary care of youth in physically restricting facilities. The only purpose of detaining a youth should be:

(a) to ensure the safety of the community or of the youth;

(b) to ensure the youth's appearance in court; and,

(c) to await transfer to another jurisdiction.

The three purposes listed should be applied only if a preliminary decision has been made that further action will be taken by the youth court.

***2. "Shelter care" is the temporary care of youth in physically unrestricting facilities. The only purposes for placing a youth in shelter care should be:

(a) to allow the youth and his/her family the opportunity to address their problematic situation when it is not possible for the youth to remain at home;

(b) to protect the youth from physical and/or emotional harm;

(c) to prevent or deter the youth from immediate repetition of his/her troubling behavior;

(d) to provide the opportunity for assessment of the youth and his/her environment;

(e) to provide adequate time for case planning and disposition; and,

(f) to intervene in a crisis situation and provide intensive services/attention that might alleviate the problem and reunite the family.

3. As much care must be taken to avoid the misuse and overuse of shelter care and other alternatives to detention, as with detention itself.

4. Similarly, dependent, neglected, and abuse youth should never be placed in detention, not only to avoid exposure to criminally involved individuals, but also to ensure appropriate care of these youth who are victims rather than offenders.

5. In order to further avoid the misuse of detention on the grounds that there is no other alternative available, shelter care facilities and services with varying degrees of supervision, and therefore, security should be developed.

6. Every effort should be made to hold youth in the least restrictive alternative available while ensuring the safety of the community and the youth.

7. No matter who makes the decision to detain, a review should occur immediately to determine if the detention should continue.

***8. District Youth Guidance Homes are dispositional in nature and should not be used for detention and shelter care of youth.

9. The statutes should carefully and clearly set policies for detention and shelter care in Montana.

***10. In order to establish a guide to decision-making and assure fair and equal treatment in detention and shelter care, criteria must be established and used statewide to determine if a youth should be detained or sheltered.

***11. The law should strongly and clearly designate the appropriate detention and shelter decision-making agencies and assign those agencies the responsibility to make such decisions.

12. It is recommended that the provision of 24-hour intake services be available where practical and that the youth courts be funded in a manner to provide the supplemental manpower for such services.

13. State-established criteria for detention determination of a youth should consist of these basic factors:

(a) whether there is reasonable cause to believe that the youth had committed or was committing an offense. (Gerstein v. Pugh, U.S. Supreme Court);

(b) whether detention is necessary for the safety of the community or of the youth;

(c) whether there are adequate assurances that the youth would be present for further court or administrative action; and,

(c) whether the youth is pending transfer to another jurisdiction.

14. State-established criteria for shelter care determination should consist of these basic factors:

    (a) whether the youth and his/her family needs shelter care to address their problematic situation when it is not possible for the youth to remain at home;

    (b) whether the youth needs to be protected from physical or emotional harm;

    (c) whether the youth needs to be deterred or prevented from immediate repetition of his/her troubling behavior;

    (d) whether there is need to shelter in order to assess the youth and his/her environment;

    (e) whether there is need for shelter care in order to provide adequate time for case planning and disposition; and/or,

    (f) whether shelter care is necessary to intervene in a crisis situation and provide intensive services/attention that might alleviate the problem and reunite the family.

15. Any youth who appears or is known to have suicidal tendencies or will probably need medical attention due to alcohol or drug abuse must not be detained in a local jail or lockup, but rather should be immediately referred to a local hospital with appropriate facilities.

16. It is recommended that the intake services provided by SRS, Juvenile Probation Offices, and the Bureau of Aftercare, inlcude staff who will be physically present (where practical) when a youth is referred for possible detention or shelter care.

17. Intake services should include crisis intervention counseling for the youth and his/her family and allow for possible diversion from the detention/shelter care system.

18. If a youth is to be detained for more than 24-hours, an authorization to hold or court order shall be obtained from the youth court judge within 24-hours of the initial detention. If the judge is not available, the chief probation officer (or aftercare counselor if youth is under aftercare supervision) may authorize the youth's detention, but shall notify the youth court judge of the detention as soon as possible.

    The authorization to hold shall be requested from the probation officer (or aftercare counselor) who made the detention decision to detain the youth and shall inlcude the following information:

    (a) the youth's name;

    (b) the alleged violation;

(c) reasons for detnetion;

(d) the date and time of initial detention;

(e) other placement alternatives investigated;

(f) date and time of authorization requested;

(g) probation officer (of aftercare counselor) requesting the authorization;

(h) date and signature of authorization; and,

(i) evidence of notification of the youth court judge.

19. Any youth detained should be notified immediately of his/her option to petition the court for a hearing on the detention as stated in Section 10-1216(4).

20. Adequate shelter care services should be developed to adequately meet the shelter care needs of youth served by the youth courts, SRS, and Aftercare.

21. Detention centers should not be developed at this time due to the low average daily population of youth in detention in Montana (1975 = 24.7).

22. Attention Home Programs providing group shleter care should be developed in Billings, Great Falls, and other locales that can demonstrate need. Emergency foster care programs should be developed in rural areas.

***23. SRS, Aftercare (Department of Institutions), and youth courts should be provided with the financial capability from state appropriation matched with Federal Funds to purchase shelter care services at actual cost of providing those services (Attention Homes = $14 to $18 per youth care day; Other Shelter Care = $5 to $10 per day).

24. Home supervision programs, which provide intensive supervision of a youth while he/she remains in his/her home pending court action, should be considered by youth-serving agencies.

25. A manager of the shetler care voucher system should be provided for system development, technical assistance and maintenance activities.

DETENTION & SHELTER CARE PLAN BUDGET

INTRODUCTION

The following budget reflects the basic deinstitutionalization philosophy of the Detention & Shelter Care Plan. The major assumption is that a system of shelter care for youth in crisis is mostly non-existent, and in those areas where resources do exist, financial resources are not available within the juvenile justice system to support their ongoing activiites. The following budget addresses the goal of establishing a mechanism for the development and implementation of a shelter care system in Montana for the purpose of reducing jail population and providing services to youth in crisis.

Major Provision of the Budget

1. A Purchase of Service System for shelter care services actually delivered by juvenile probation and Bureau of Aftercare. This purchase of service arrangement will provide shelter care services to 3,348 youth over the next two years. This will be at a rate of $8.00 per day for emergency foster care, primarily in rural areas, and $15.00 per day for Attention Home care in four existing Attention Homes located in Helena, Butte, Anaconda, and Missoula. It is anticipated that three additional homes will be developed during the next 2 years.
2. Through the Montana Supreme Court, or executive branch agencies such as the Department of Social and Rehabilitation Services or Department of Institutions provide for management of the Purchase of Service System for juvenile probation and evaluation of its effectiveness. Funds dispursed by the Bureau of Aftercare for their youth will be monitored in a like fashion by existing staff.

3. Development of needed resources

   - 3 Attention Homes and 3 Juvenile Probation intake units in more populous areas.
   - 5 combination emergency foster care and juvenile probation intake units in more rural areas.

It is important to note that the Board of Crime Control is intending on providing 90 percent of Proposed Expenditures for Shelter Care Services during the 78-79 Biennium. The Legislature will be requested to provide funding for the Purchase of Service and Management aspects of the system during the next legislative session. The Legislature will not be requested to fund facilities and startup costs since the majority of the system will be operational by then.

However, subsequent requests to the Legislature will be conditioned by the overall effectiveness of the Purchase of Service System in terms of levels of effectiveness and ability to reduce detention populations. The magnitude of the request will range from 250,000 to 350,000 but, again, this amount is highly conditional.

SUMMARY OF PROPOSED EXPENDITURES FOR SHELTER CARE SERVICES
FY 78-79

CATEGORY	SOURCE			
	Federal	State	Local	Total
Purchase of Service for Shelter Care	253,487	28,165		281,652 *
Management of Shelter Care System	45,981	5,109		51,090
Development of Attention Homes (3 statewide @ $60,000 each)	162,000		18,000	180,000
Development of Emergency Foster Home/Intake Projects (5 statewide @ $15,000 each)	67,500		7,500	75,000
Development of Juvenile Probation Intake Units (3 statewide @ $15,000 each)	40,500		4,500	45,000
	569,468	33,274	30,000	632,742

* $238,390 for Juvenile Probation
$43,262 for Bureau of Aftercare

Purchase of Service

Projected needs for juvenile probation and Bureau of Aftercare for shelter care by type of service.

EMERGENCY FOSTER CARE

Total Number of Units*	3,799.5
Average Cost Per Day	8.00
FY78 Total Projected Emergency Foster Care Expenditures	$ 30,396.00
FY78-79 Total Projected Emergency Foster Care Expenditures	$ 60,792.00

ATTENTION HOMES

Total Number of Units	7,362
Average Cost Per Day	$ 15.00
FY78 Total Projected Attention Home Expenditure	$110,430.00
FY78-79 Total Projected Attention Home Expenditures	$220,860.00

FY78-79 Total Projected Expenditures for Shelter Care Services	$281,652

* Unit defined as one day of care per child. Number of youth X average number of days. Please refer to attachments 1 & 2 for a detailed breakdown of shelter care needs by area.

SHELTER CARE MANAGEMENT

Goal Statement

Establish a mechanism for the development and implementation of a shelter care system in Montana for the purpose of reducing jail populations and providing services for Youth in Crisis.

Objective

Provide funds to local juvenile probation offices on a reimbursement basis for provision of shelter care services.

Method

Develop and implement an accountable reimbursement mechanism for local purchase of shelter care services by juvenile probation offices.

Objective

Develop and improve the technical and qualitative aspects of the provision of shelter care services.

Method

In cooperation with the Department of Institutions, Department of Social and Rehabilitation Services, Board of Crime Control and Judicial Districts:

- Assist agencies in defining the appropriate use of shelter care services in general.
- Provide ongoing specific consultation to local agencies and programs when requested.

Objective

Determine the effectiveness of the shelter care system in reducing jail populations and providing services to youth in crisis.

Method

- In cooperation with the Montana Board of Crime Control monitor the Juvenile Probation Information System for reductions in jail population and numbers of detention days by type of offense and other characteristics.
- Develop an information system on types and disposition of youth who have utilized shelter care services.

BREAKDOWN OF PROPOSED EXPENDITURES FOR MANAGEMENT OF SHELTER CARE SYSTEM

Personnel:		
Program Manager V		$15,722
Fringe @ 14%		2,201
		$17,923
Travel:		
Out-of-State		$ 1,400
In-State		4,372
		$ 5,722
Consultants:		
@ $135 per day		$ 1,350
Supplies:		$ 500
	TOTAL FY78	$25,545
	TOTAL FY78-79	$51,090

ATTACHMENT 1

JUVENILE PROBATION
PROJECTED NEEDS FOR SHELTER CARE
BY JUDICIAL DISTRICT

JUDICIAL DISTRICT	NUMBER OF YOUTH	NUMBER OF YOUTH IN EMERGENCY FOSTER CARE	NUMBER OF YOUTH IN ATTENTION HOME HOMES	AVERAGE NUMBER OF DAYS	TOTAL EMERGENCY FOSTER CARE UNITS *	TOTAL ATTENTION HOME UNITS *
1	30		30	18		540
2	90	4	86	3	12	258
3	45	5	40	30	150	1,050
4	200		200	7		1,400
6	55	10	45	3	30	135
7	17	17		4		
8	90		90	3		270
10	15	15		5	45	
11	12	12		4	48	
12	10	10		5	50	
13	750	250	500	3.3	825	1,650
15	15	15		30	450	
16	147	77	70	15	1,155	1,050
17	40	40		4	160	
18	25	25		2.5	625	
	1,541	480	1,061	9.12	2,987.5	6,353

2987.5 Emergency Foster Care Units x $8.00/day = $23,900 Total projected shelter care expenditures FY78 $119,195

6,353 Attention Home Units x $15.00/day = $95,295 Total projected shelter care expenditures FY78-79 $238,390

* Unit is defined as one day of care per youth. # of youth x average # of days.

ATTACHMENT 2
BUREAU OF AFTERCARE
PROJECTED NEEDS FOR SHELTER CARE
BY REGION

REGION	# OF YOUTH	NUMBER OF YOUTH IN FOSTER CARE	AVERAGE # OF DAYS EMERGENCY FOSTER CARE	NUMBER OF YOUTH IN ATTENTION HOMES	AVERAGE # OF DAYS IN ATTENTION HOME	TOTAL EMERGENCY FOSTER CARE UNITS *	TOTAL ATTENTION HOME UNITS *
POLSON	4	4	40			160	
GLENDIVE	3	3	20			60	
KALISPELL	5	5	2.4			12	
MISSOULA	31	6	14	25	15.7	392	84
GREAT FALLS	25	10	1	15	3.3	10	50
HAVRE/BUTTE	12	2	4	10	4	8	40
BOZEMAN	3		30	3		90	
HELENA	50	5	6	45	18	30	810
BILLINGS	15	10	5	5	5	50	25
TOTAL	133	45	13.6	88	9.2	812	1,009

812 Emergency Foster Care Units x $8.00/day = $6,496

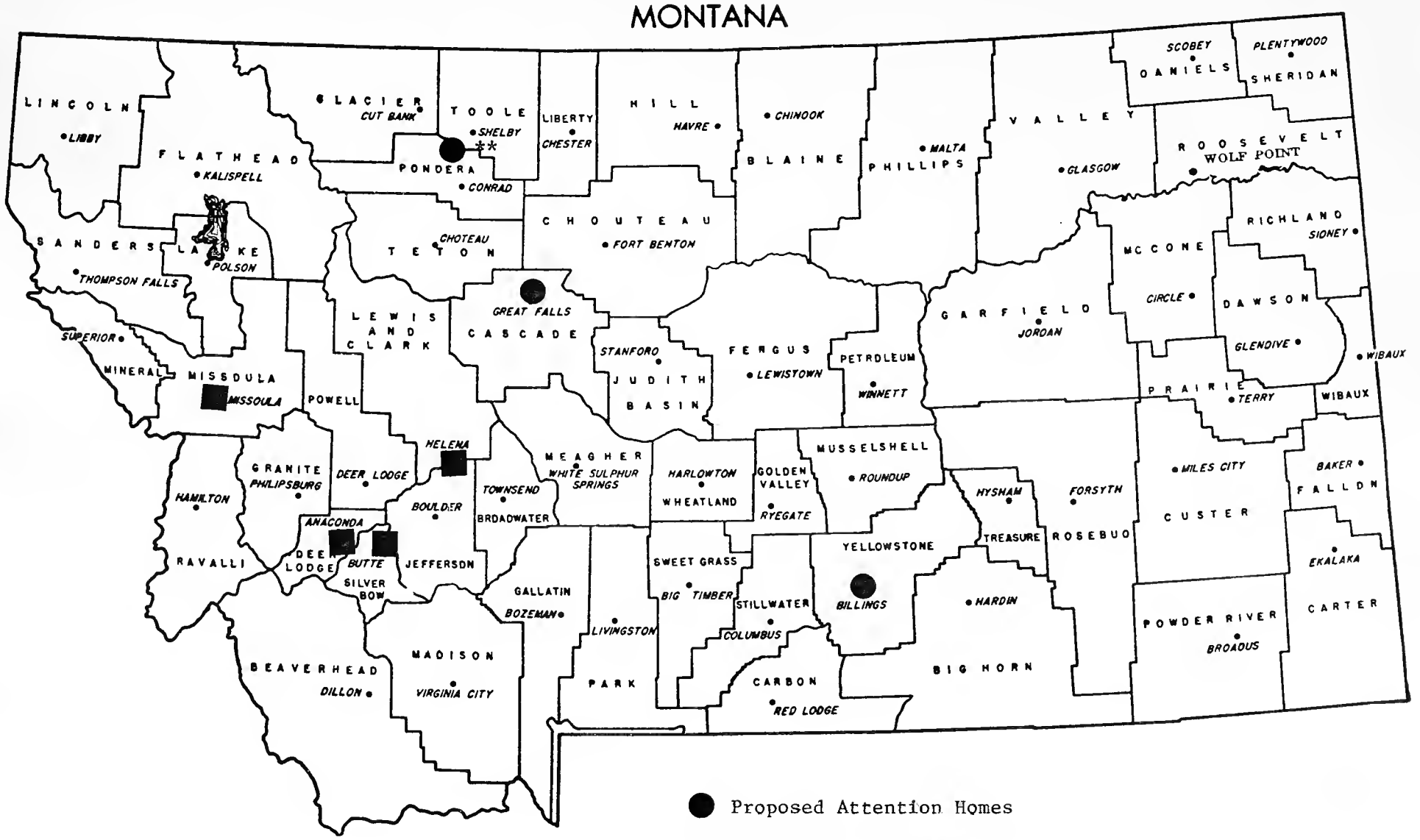
1009 Attention Home Units x $15.00/day = $15,135

Total projected shelter care expenditures FY78 = $21,631
Total projected shelter care expenditures FY78-79 = $43,262

* Unit is defined as one day of care per youth.
# of youth x average # of days.

ATTACHMENT 3

OPERATING AND PROPOSED ATTENTION HOMES



** Will cover a Tri-County area

SUMMARY

This memorandum discusses the legal liability of local and state officials for detention of juveniles in adult jails in Montana. It covers the injuries suffered by children detained in adult jails; the bases for liability, under state and federal law, of the various local and state officials who have legal responsibility for juveniles detained in jails, and the immunity and indemnification provisions applicable to such local and state officials.

In view of the clear prohibitions on confinement of juveniles in adult jails, contained in state statutory law as well as federal civil rights law, it appears that at a minimum, local sheriffs and county commissioners, who are responsible for detention of juveniles detained in jails, are extremely vulnerable to state tort actions for damages, as well as federal civil right actions for damages and injunction relief. To the degree that juvenile court judges are responsible for commitment of juveniles to adult jails, and that the Department of Institutions is responsible for detention of juveniles, they may also be vulnerable to suit. Furthermore, state and federal immunities would probably not apply to such officials.

Since the officials of the probation departments are not charged with direct responsibility over juvenile detention and the custody of arrested juveniles, it is unlikely that they would be held liable for damages. Nevertheless, since they have a legal responsibility in this area, they would almost certainly be named as defendants in any significant litigation, and would be liable to injunctive orders prohibiting further confinement of juveniles in adult jails.

TABLE OF CONTENTS

I) INTRODUCTION

Montana has made significant progress in recent years towards separating detained juveniles and adults as well as towards keeping status offenders out of secure detention altogether. However, throughout the state, juveniles are detained in adult jails, as no separate juvenile detention facilities exist. Such detention in jail still includes status offenders, in violation of the provisions of the Juvenile Justice and Delinquency Prevention Act. Total separation of adults and juveniles within the jails has not yet been accomplished, also in violation of the Juvenile Justice and Delinquency Prevention Act.

The most recent available data on juvenile detention in jails was gathered in 1979 and compiled by the Montana Board of Crime Control. Fifty-seven facilities are available throughout the state, for secure detention. One of these facilities is a state youth forest camp. The remainder are county jails. These include every county jail in the state. Forty-three of these facilities are, in fact, used to detain juveniles. Of these, thirty-three do not provide adequate separation of adults and juveniles. Specifically, eleven facilities do not prevent conversation between adult and juvenile inmates while in their cells. Two jails employ adult trustees in the care and custody of juveniles. Thirty-one jails do not insure separation during admissions. Where separation is fully implemented, it is often the result

of a total lack of facilities (e.g., recreation, education and medical care) or of keeping all inmates in their cells (e.g., for dining).

When youth are detained, they are held in clearly inappropriate facilities. Moreover, juveniles are still being detained in large numbers. In 1979, 4,561 cases were filed in Youth Court. Of these, 933 or 20.5% were detained. The detained youths included 620 or 66.5% with delinquency petitions and one with a youth in need of care petition pending.

Four hundred fifty-three or 48.5% of the youths detained were held for twenty-four hours or less. Three hundred forty-six or 37% were held for one-to-five days. One hundred eleven or 12% were held for more than five days. Twenty-three or 2.5% were held for an unknown period of up to forty-eight hours.

Of the four hundred fifty-three held twenty -four hours or less, 160 or 35% were alleged youth in need of supervision and two hundred ninth-three or 65% were alleged delinquents. Of the three hundred forty-six youths held for one-to-five days, 120 or 35% were alleged in need of supervision and 225 or 65% were alleged delinquents. Of the 111 youths held for more than five days, 16 or 14% were alleged youth in need of supervision and 95 or 86% were alleged delinquents.

II. INJURIES SUFFERED BY CHILDREN IN ADULT JAILS

Virtually every national organization concerned with law enforcement and the judicial system--including the National Council on Crime and Delinquency, American Bar Association and Institute for Judicial Administration, National Advisory Commission on Law Enforcement, and National Sheriffs' Association -- has recommended or mandated standards which prohibit the jailing of children. This near unanimous censure of jailing children is based on the conclusion that the practice harms the very persons the juvenile justice system is designed to protect and assist. As was concluded in Senate hearing on the subject:

> Regardless of the reasons that might be brought forth to justify jailing juveniles, the practice is destructive for the child who is incarcerated and dangerous for the community that permits youth to be handled in harmful ways. Hearings on the Dentention and Jailing of Juveniles Before the Senate Subcommittee on Juvenile Delinquency, Committee on the Judiciary, 93rd Cong. 1st Sess. (1973)

Jailing children hurts them in several ways. The most widely known harm is that of physical and sexual abuse by adults in the same facility. The cases of assault and rape of juveniles in jail are too many to be enumerated and too common to be denied. Even short-term, pre-trial or relocation detention in an adult jail exposes male and female juveniles to sexual assault and exploitation and physical injury. One textbook gives the following description of the dangers of being a juvenile in jail:

> Most of the children in these jails have done nothing, yet they are subjected to the cruelest of abuses. They are confined in overcrowded

> facilities, forced to perform brutal exercise routines, punished by beatings by staff and peers, put in isolation, and whipped. They have their heads held under water in toilets. They are raped by both staff and peers, gassed in their cells, and sometimes stomped or beaten to death by adult prisoners. A number of youth not killed by others end up killing themselves. Bartollas and Miller, The Juvenile Offender: Control, Correction and Treatment 212 (1978).

Sometimes, in an attempt to protect a child from attack by adult detainees, local officials will isolate the child from contact with others. This also has been shown to be harmful to the child. As Dr. Joseph R. Noshpitz, past president of American Association for Children's Residential Centers and Secretary of the American Academy of Child Psychiatry testified in Lollis v New York State Department of Social Services, 322 F. Supp. 473, 481 (S.D.N.Y. 1970), that placing juveniles in jail often causes them serious emotional distress and even illness:

> In my opinion extended isolation of a youngster exposes him to conditions equivalent to 'sensory deprivation." This is a state of affairs which will cause a normal adult to begin experiencing psychotic-like symptoms, and will push a troubled person in the direction of serious emotional illness.
>
> What is true in this case for adults is of even greater concern with children and adolescents. Youngsters are in general more vulnerable to emotional pressure than mature adults; isolation is a condition of extraordinarily severe psychic stress; the resultant impact

> on the mental health of the individual exposed to such stress will always be serious, and can occasionally be disastrous.

Having been built for adults who have committed criminal acts, jails do not provide an environment suitable for the care and keeping of delinquents or status offenders. They do not take into account the child's perception of time and space or his naivete regarding the purpose and duration of his stay in a locked facility. The lack of sensory stimuli, extended periods of absolute silence or outbreaks of hostility, foul odors and public commodes, and inactivity and empty time can be an intolerable environment for a child.

For the juvenile offender who is jailed with adults his term of detention exposes him to a society which encourages his delinquent behavior, even giving him sophisticated criminal techniques and contacts. High recidivism rates have been shown to be false the belief that the unpleasant experience of incarceration will have a deterrant effect on a child's future delinquent acts. To the contrary,

> If a youngster is made to feel like a prisoner, then he will soon begin to behave like a prisoner, assuming all the attributes and characteristics which he has learned from fellow inmates and from previous exposure to the media. Komisaruk, Psychiatric Issues in the Incarceration of Juveniles, 21 Juvenile Court Journal 118 (1971).

Being treated like a prisoner also reinforces the delinquent or truant child's negative self image. It confirms what many delinquent children already fear about lack of social acceptance and self worth. In its Standards and

Guides for the Detention of Children and Youth, the National Council on Crime and Delinquency concluded:

> The case against the use of jails for children rests upon the fact that youngsters of juvenile court age are still in the process of development and are still subject to change, however large they may be physically or however sophisticated their behavior. To place them behind bars at a time when the whole world seems to turn against them and belief in themselves is shattered or distorted merely confirms the criminal role in which they see themselves. Jailing delinquent youngsters plays directly into their hands by giving them delinquency status among their peers. If they resent being treated like confirmed adult criminals, they may--and often do--strike back violently against society after release. The public tends to ignore that every younster placed behind bars will return to society, which placed him there. National Council on Crime and Delinquency Standards and Guides for the Detention of Children and Youth, 13 (1961).

Additionally, incarceration in a jail carries with it a degree of criminal stigma. A community seldom has higher regard for those incarcerated in a jail than it does for the jail itself. This is especially handicapping to a youth from a rural or less sophisticated community with a small population.

Thus, the impact of jailing juveniles is directly in conflict with the purpose of the juvenile justice system which was expressly created to remove children from the punitive forces of the criminal justice system. To expose a girl or boy to the punitive conditions of a jail is to immediately jeopardize his or her emotional and physical well-being as well as handicap future rehabilitation efforts.

Consequently, detention of juveniles must be examined in light of the Montana Youth Court Act and the Juvenile Justice and Delinquency Prevention Act of 1974, pursuant to which Montana receives funding, to determine whether it is legal or appropriate and the circumstances under which such detention should be used.

III. LIABILITY OF LOCAL AND STATE OFFICIALS FOR DETENTION OF JUVENILES IN ADULT JAILS: OBLIGATIONS UNDER STATE AND FEDERAL LAWS

A. Statutory Provisions Regarding Use of Jails

The purpose of the Montana Youth Court Act (M.C.A. §41-5-101 et seq.), which confers court jurisdiction over juvenile delinquents and youth in need of supervision is set forth in M.C.A. §41-5-102:

> (1) to preserve the unity and welfare of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of a youth coming within the provisions of the Montana Act;
>
> (2) to remove from youth committing violations of the law the element of retribution and to substitute therefore a program of supervision care, rehabilitation, and in appropriate cases, restitution as ordered by the youth court;
>
> (3) to achieve the purposes of (1) and (2) of this section in a family environment whenever possible, separating the youth from his parents only when necessary for the welfare of the youth or for the safety and protection of the community;
>
> (4) to provide judicial procedures in which the parties are assured a fair hearing and recognition and enforcement of their constitutional and statutory rights.

The use of jails for detention of juveniles violates this statutory purpose because it destroys family unity, and pre-

vents the provision of care, protection and the wholesome development of a youth.

The Code allows the use of jails for detention of alleged delinquent juveniles or youth in need of supervision only in specific, carefully limited situations and only pursuant to the general purpose clause of the Act. M.C.A. §41-5-306 provides:

> (1) A youth alleged to be a delinquent youth or youth in need of supervision may be sheltered only in:
>
> (a) a licensed foster home or a home approved by the court for the provision of shelter care for youth;
> (b) a facility operated by a licensed child welfare agency;
> (c) a licensed detention home or shelter facility which is operated by a nonprofit corporation or the youth court for the provision of shelter care of youth;
> (d) any other suitable place or facility designated or operated by the court for the supervision of youth in shelter care.
>
> (2) Youth may be detained in a jail or other facility for the detention of adults only if:
>
> (a) The facilities in subsection (1) are not available or do not provide adequate security;
> (b) the detention is in an area physically and visually separate and removed from those of adults;
> (c) it appears to the satisfaction of the court that public safety and protection reasonably require detention; and
> (d) the court so orders.
>
> (3) The official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime shall inform the court immediately if a person who is or appears to be under the age of 18 years is received at the facility. Such official shall bring the person before the court upon request or deliver him to a detention facility designated by the court.

Under the Code, detention of youth in jail is illegal if there is no court order so mandating or if alternative facilities are available, unless the child is clearly a threat to public safety. When a child is detained in jail, it should be for the shortest amount of time possible, to avoid violation of the purposes clause, M.C.A. §41-5-102. Furthermore, if a youth is detained in jail, physical and/or visual contact with adult detainees is never allowed.

Unlike alleged delinquents, youth allegedly dependent, abused or neglected may never be detained in adult jails. M.C.A. §41-5-306 (4) states:

> A youth alleged to be in need of care shall be placed only in the facilities stated in subsection (1) of this section and shall not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses.

If any youth is detained in jail in violation of the carefully delineated circumstances and/or conditions, state law has been violated by the officials who authorize or allow such detention or who fail to prevent or eliminate such detention when under a legal duty to take proper care of juveniles under their jurisdiction. Such officials may thus incur liability from the very fact that such detention occurs. Additionally, such officials may incur liability for physical or mental injuries sustained by juveniles as a result of being kept in jail, including injuries resulting from the conditions of incarceration, such as psychological trauma and depression. as well as injuries received in assaults by other prisoners.

B. Statutory Obligations of Local and State Officials.

1. Obligations Under State Law

(a) County Commissioners

Under Montana law, county commissioners have primary responsibility for carrying out the provisions of the Youth Court Act. M.C.A. §41-5-104 states:

> The county commissioners of all counties are hereby authorized, empowered and required to provide the necessary funds and to make all needful appropriations to carry out the provisions of this chapter.

The County Commissioners also have primary responsibility for the maintenance of county jails. M.C.A. §7-32-2201 states:

> (1) A jail shall be built or provided and kept in good repair at the expense of the county in each county, except that whenever in the discretion of the commissioners of two or more counties it is necessary or desirable to build, provide, or utilize a common jail, they may do so in any city or town located within one of the counties so concerned on a basis as the commissioners of the counties shall agree.
>
> (3) The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law, to cause a jail to be erected, furnished and maintained.

Under M.C.A. §7-32-2204:

> The county commissioners have the care of building, inspecting and repairing the jail and: (1) must, once every three months, inquire into its state, as respects the security thereof, and the treatment and condition of prisoners' and (2) must take all necessary precautions against escape, sickness and infection.

Included in the county commissioner's responsibility for maintenance of the jails, is responsibility for following the

instructions and rules of both the Department of Health & Environmental Sciences and the local boards of health. The Department of Health and Environmental Sciences is empowered and required to inspect and work in conjunction with custodial institutions (M.C.A. §50-1-202 (4))and to advise state agencies on location, drainage, water supply, disposal of excretia, heating, plumbing, sewer systems, and ventilation of public buildings (M.C.A. §50-1-202 (6)). "Anyone who violates a rule adopted by...the department for which no penalty is specified is guilty of a misdemeanor" M.C.A. §50-1-104.

Local boards of health shall "supervise inspections of public establishments for sanitary conditions" M.C.A. §50-2-116(1)(h) and may "adopt rules which do not conflict with rules adopted by the Department (of Health & Environmental Sciences): (i) for the control of communicable diseases; (ii) for the removal of filth which might cause disease or adversely affect public health, (iii) on sanitation in public buildings which affects public health; (iv) for heating, ventilation, water supply, and waste disposal in public accomodations which might endanger human lives" M.C.A. §50-2-116(2)(k).

M.C.A. §50-2-124 sets forth penalties for violations:

> (1) A person who does not comply with rules adopted by a local board is guilty of a misdemeanor. On conviction, he shall be fined not less than $10 or more than $50.

> (2) Except as provided in subsection (1) of this section and §50-2-123, a person who violates the provisions of this chapter or rules adopted by the department under the provisions of this chapter is guilty of a misdemeanor. On conviction, he shall be fined not less than $10 or more than $500, imprisoned for not more than 90 days or both.

Because county commissioners are responsible for the health and safety of persons confined in the jails, they could be held criminally liable for violations of rules adopted by either the Department of Health & Environmental Sciences or a local board of health. Any injuries suffered by juveniles as a result of such criminal violations (i.e. violations of duty of care) would result in civil liability for the commissioners.

As discussed earlier, County Commissioners are responsible for carrying out the provisions of the Youth Court Act, under M.C.A. §41-5-104. Once such provision is the statement of purpose at M.C.A. §41-5-102, which includes providing for the care, protection and wholesome mental and physical development of a youth within the jurisdiction of the Act and providing a program of rehabilitation. Therefore, the commissioners must not only take all precautions required to protect the health and safety of adult prisoners, but must insure treatment of youth that promotes their reformation and wholesome mental and physical development. To the extent that children are detained under conditions which endanger their health

and safety, commissioners fail in both their responsibility to insure the safety of persons in jail and to provide even greater protection for juveniles under their supervision.

(b) Sheriffs

Juveniles detained in adult jails are in the custody of the local sheriff or director of public safety.[1/] MCS §7-32-2121 describes the duties of the sheriff, including the duty to take charge of and keep the county jail and prisoners therein. The sheriff may appoint a deputy to act as jailer. MCA 7-32-2123. Given the sheriff's responsibility for prisoners, the sheriff would be responsible for conditions which endanger the prisoners and for any improper treatment of juveniles.

Additionally, the conditions for the treatment of juveniles set forth in the Youth Court Act, are binding on the sheriff. Included in these provisions are §41-5-306(2)(b) which requires physical and visual separation of juveniles from adults and §41-5-306(3) which requires that the official in charge of the jail inform the court immediately if a person who is or appears to be under 18 is received at the facility. The official shall bring the person before the court upon request or deliver him to a detention facility designated by the court.

1/ MCS 7-32-101: In counties other than first -and second-class counties, on agreement of the legislative body of a city or town with the county commissioners of the city in which it is located, there may be established a department of public safety in lieu of a police department and a sheriff's office.

MCA 7-32-102: The director of the department of public safety shall be the sheriff.....

The duties of the sheriff with regard to juveniles are further clarified in the Youth Court Act. §41-5-307 establishes that whenever a peace officer (i.e. the sheriff or a police officer), believes on reasonable grounds that a youth must be detained, s/he must notify a probation officer immediately and as soon as practicable, provide the office with a written report of the reasons for holding the youth pending their appearance before the youth court. The youth must be held in a place approved by the court and completely separated from adult offenders.

(c) City or Town Councils

Under MCA §7-32-420, a city or town council has the power to establish and maintain municipal jails for the confinement of persons convicted of violating city or town ordinances and to make rules for governance of such jails (and to cause prisoners to work on the streets or elsewhere within three miles of the city). Therefore, just as the county commissioners are responsible for protection of health and safety and for insuring treatment which promotes reformation and wholesome mental and physical development of juveniles held in county jails, city or town council members may be liable for violating the same responsibilities with respect to municipal jails.

(d) Department of Institutions

The purpose of the Department of Institutions is set forth at MCA 53-;-201:

> The department shall utilize at maximum efficiency the resources of state govern-

ment in a coordinated effort to:

1) restore the physically or mentally disabled;
2) rehabilitate the violators of law;
3) sustain the vigor and dignity of the aged;
4) provide for children in need of temporary protection or correctional counseling;
5) train children of limited mental capacity to their best potential;
6) rededicate the resources of the state to the productive independence of its now dependent citizens; and
7) coordinate and apply the principles of modern institutional administration to the institutions of the state.

To accomplish this purpose, the department may establish, maintain and operate facilities to properly diagnose, care for, train, educate and rehabilitate children. MCA §53-30-202. Facilities under the department's authority include: the state prison, the children's center, training schools and any other institution which provides care and services for juvenile reception and evaluation center.

While county jails are not under the direct supervision of this division of the state government, the department has responsibility for youth held in local jails under its authority to provide for children in need of temporary protection (MCA §53-1-201(4)) and under its responsibility for "other institutions which provide care and services for juvenile delinquents" (MCA §53-1-202(1)).

Within the department, the warden or superintendent of each institution is responsible for the immediate management and control of his or her respective institution,

subject to the general policies and programs established by the department.

(e) Probation Officers

Probation Officers are empowered and obligated under MCA §41-5-703 to make predisposition studies and submit reports and recommendations to the court, to supervise, assist and counsel youth placed on probation or under their supervision and to enter into informal adjustments and give counsel and advice to the youth and other interested parties if it appears that the admitted facts bring the case within the jurisdiction of the court, and such counsel and advice are in the best interests of the child and the public.

Any informal adjustment entered into by a probation officer before a petition is filed must be approved by the youth court if the complaint alleges commission of a felony or if the youth has been or will be in any way detained. MCA §41-5-523. After a petition has been filed, proceedings can be suspended and a negotiated consent decree can be ordered only by the youth court. MCA §41-5-524(1). Because the court is the ultimate decision maker regardless of the outcome of the proceedings (where detention may be involved), the responsibilities of the probation officer are minimal. Direct liability is thus avoided.

However, probation officers have the power to take into custody any youth who violates either probation or a lawful

order of the court. MCA §41-5-703. This power must be exercised consistently with the requirements of the Youth Court Act purposes section. Therefore to the extent that it wrongfully detains a juvenile, the probation department would be in violation of applicable law.

(f) Juvenile Court Judges

The Youth Court Act in MCA §41-5-523(3), prohibits the commitment or transfer of any youth found to be delinquent or in need of supervision to a penal institution or other facility used for the execution of sentence of adults convicted of crimes except as provided by §(2)(b).[2/]

The Youth Court has exclusive original jurisdiction of all proceedings under the Youth Court Act in which a youth is alleged to be a delinquent youth or a youth in need of supervision. MCA §41-5-203.

2/ (b) in the case of a delinquent youth 16 years or older whom the court considers a suitable person for placement at a youth forest camp, notify the director of the department of institutions of the finding. The director of the department of institutions shall then designate to the court the facility to which the youth shall be delivered for evaluation. The court may then commit the youth to the department of institutions for a period not to exceed 45 days for the purpose of evaluation as to the youth's suitability for placement and order the youth delivered directly to the facility for evaluation , as designated by the director. If after the evaluation the department of institutions reports to the court that such child is suitable for placement in a youth forest camp and if there is space available at a camp, the court may then commit such child directly to the youth forest camp under the terms of committment of this chapter. If the department of institutions reports and states the reasons to the court why the youth is not suitable for placement, the youth shall be returned to the court for such further disposition as the court may consider advisable under the provisions of this chapter. The costs of transporting the youth to the designated youth facility for evaluation and cost of returning the youth to the court shall be borne by the county of residence of the youth.

The court retains jurisdiction unless explicitly terminated or the youth is transferred to adult criminal court or until the youth is committed to the custody of the department of institutions. MCA §41-5-205. The court thus has initial and continuing responsibility for an inappropriate or illegal placement of a juvenile.

2. Liability Under Federal Law

(a) Juvenile Justice and Delinquency Prevention Act

The federal Juvenile Justice and Delinquency Prevention Act [3] requires states to develop state plans for implementation of the Act which will insure that (1) juveniles charged with or who have committed offenses that would not be criminal if committed by an adult ("status offenders"), and such nonoffenders as dependent and neglected children, are not placed in secure facilities at all, [4] and (2) that juveniles alleged or found to be delinquent, status offenders

> ...shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted or are awaiting trial on criminal charges. [5]

3/ 42 U.S.C. §5601 et seq.

4/ 42 U.S.C. §5633(a)(12).

5/ 42 U.S.C. §5633(a)(13). In addition, the Federal Juvenile Delinquency Act, 18 U.S.C. §5031 et seq, which applies to juveniles prosecuted in federal courts provides:

> A juvenile alleged to be delinquent may be detained only in a juvenile facility or such other suitable place as the Attorney General may designate. Whenever possible, detention shall be in a foster home or community based facility located in or near his home community. The Attorney General shall not cause any juvenile alleged to be delinquent to be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges. Insofar as possible, alleged delinquents shall be kept separate from adjudicated delinquents. Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment.

It is noteworthy that the Act is designed primarily as a funding statute: states are provided with funds to implement the goals of the Act, and become ineligible for continued funding if they fail to achieve compliance within a specified time period. 6/ The Act does not specifically provide for private lawsuits by aggrieved individuals, e.g., by individual status offenders who are kept in secure facilities, or by individual juveniles kept in adult jails.

Recent case law, however, indicates that individual juveniles may well be able to maintain private causes of action under the Act. In Cannon v University of Chicago, 99 S. Ct. 1946 (1979), decided on May 14, 1979, the United States Supreme Court considered whether an aggrieved individual can maintain a private cause of action under Section 901(a) of Title IX of the Education Amendments of 1972. Section 901 provides that no person shall be subjected to discrimination on the basis of

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6/ 42 U.S.C. §5633 (a), (c).

sex under any education program or activity receiving federal financial assistance. Plaintiff Geraldine Cannon claimed that she had been denied admission to two medical schools receiving federal assistance because she was a woman and filed suit against the schools for violations of Section 901.

Like the Juvenile Justice and Delinquency Prevention Act, Title IX is primarily designed as a funding statute and contains no express authorization that individuals can maintain private lawsuits for violations of the law. Nevertheless,the Supreme Court ruled that a statute may be construed to provide a private remedy if four specific tests are satisfied:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted, 'Texas & Pacific R. Co. v Rigsby, 241 U.S. 33, 39, 36 S. Ct. 482, 484, 60 L.Ed. 874 (1916) (emphasis supplied)--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., National Railroad Passernger Corp. v National Assn. of Railroad Passengers, 414 U.S. 453,458,460, 94 S.Ct. 690 693, 694, 38 L.Ed. 2d 646 (1974) (Amtrak). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See,e.g. Amtrak, supra, Securities Investor Protection Corp. v Barbour, 421 U.S1 412, 423, 95 S.Ct. 1733, 1740, 44 L.Ed 2d 263 (1975); Calhoon v Harvey, 397 U.S. 134, 85 S.Ct. 292, 13 L.Ed 2d 190 (1964).

> And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?...J.I. Case Co. v Borak, 377 U.S. 426, 434, 84 S.Ct. 1555, 1560, 12 L.Ed. 2d 423 (1964); Bivens v Six Unknown Federal Narcotics Agents, 403 U.S. 388, 394-395, 91 S.Ct. 1999, 2003-2004, 29 L.Ed.2d 619 (1971); id., at 400, 91 S.Ct. at 2006 (Harlan, J. concerning in judgment). Cort v Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed2d 26.

Cannon v University of Chicago, supra, 99 S.Ct. at 1953 n. 9 (emphasis added). The Supreme Court concluded that under the four applicable tests, Title IX should be construed to allow private lawsuits by individuals subjected to sex discrimination in education.

The Court's use of the four tests and its discussion in the Cannon opinion strongly indicate that aggrieved individuals may also have private causes of action under the Juvenile Justice and Delinquency Prevention Act. In terms of the four tests, it is evident, first that juveniles confined in adult jails in Colorado are "of the class for whose especial benefit the statute was enacted": one of the primary operative provisions of the Act, 42 U.S.C. §5633 (a)(13), specifically prohibits incarceration of juveniles in jails with adults. The second and third tests require an analysis of the legislative history of the Act. That legislative history is replete with references to the importance of the prohibition of detention of juveniles in

jails with adults to the juveniles; indeed, much of the legislative history describes the operative provisions of the Act in terms of enforceable civil rights. Thus, in introducing S. 3146, the predecessor of S. 821, which became the Juvenile Justice and Delinquency Prevention Act, Senator Bayh described the provision later embodied in 42 U.S.C. §5633 (a)(13) as follows:

> My bill contains an absolute prohibition against the detention or confinement of any juvenile alleged or found to be delinquent in any institution in which adults --whether convicted or merely awaiting trial --are confined. Juveniles who are incarcerated with hardened criminals are much less likely to be rehabilitated. The old criminals become the teachers of graduate seminars in crime. In addition, we have heard repeated charges about the homosexual attacks that take place in adult institutions, and confining juveniles in such institutions only increases the likelihood of such attacks. There is no reason to allow adults and juveniles to be imprisoned together. Only harm can come from such a policy, and I would forbit it completely.

118 Cong. Rec. 3049 (1972)(emphasis added). During floor debate on the Act in 1974, Senator Hruska declared, "What we are doing here is establishing a national standard of due process in the system of juvenile justice." 120 Cong. Rec. 25165 (1974) (emphasis added). And in urging enactment of the provisions of the Federal Juvenile Delinquency Act which prohibit confinement of juveniles in jails with adults, 7/ which were passed as amendments to Juvenile Justice and Delinquency Prevention Act legislation, Senator Mathias stated:

7/ See footnote 5, supra.

> Upon Federal assumption of jurisdiction, the guarantee of basic rights to be detained juveniles becomes extremely important. Each juvenile's attitude toward society and his ability to cope with life upon his release will be affected by the treatment received while under detention. We must not permit our young people to be detained under conditions which, instead of preparing them to face life with greater optimism, will assure their future criminality.

120 Cong. Rec. 25184 (1974).

With respect to the fourth test, it may be argued that the welfare and protection of juveniles is traditionally a matter for state law, and thus it may be inappropriate to infer a cause of action under federal law. However, the welfare of juveniles is not solely a matter of state concern. Indeed, there has been federal legislation in this area for more than sixty years, including the Children's Bureau Act of 1912, 42 U.S.C. §§191-194, the Social Security Act of 1935, 42 U.S.C. §§301 et seq., the Child Health Act of 1967, 42 U.S.C. §§ 1771-1786, the Crippled Children Services Act, 42 U.S.C. §§701 et seq., the Juvenile Delinquency Prevention and Control Act of 1968, 42 U.S.C. §3801, the Juvenile Delinquency and Youth Offenses Control Act of 1961, 42 U.S.C. §§2541-2548, and the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. §5101, as well as the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§5601 et seq., discussed earlier in this memorandum.

In addition, the Supreme Court's decision in Cannon notes two other reasons why a federal remedy is appropriate in this area. First, "[s]ince the Civil War, the Federal Government and the federal courts have been the 'primary and powerful reliances' in protecting citizens against" violations of civil rights. Cannon v University of Chicago, supra, 99 S.Ct. at 1963 (emphasis in original). Second, "it is the expenditure of federal funds that provides the justification for this particular statutory prohibition. There can be no question but that this aspect of the Cort analysis supports the implication of a private federal remedy." Id. Like Title IX, the Juvenile Justice and Delinquency Prevention Act provides federal funds to the states in order to foster and protect the civil rights of individuals. Accordingly, it appears likely that a private right of action also exists under the Juvenile Justice and Delinquency Prevention Act, through which a juvenile confined in an adult jail could sue those responsible in federal court. Moreover, in its recent decision in Maine v. Thiboutot, ___ U.S. ___, 48 U.S.L.W. 50 (1980), the United States Supreme Court indicated that juveniles may also sue for violations of their statutory rights under the Juvenile Justice and Delinquency Prevention Act by filing lawsuits under 42 U.S.C. §1983.

(b) Federal Civil Rights Act, 42 U.S.C. §1983, 1988.

The federal Civil Rights Act, 42 U.S.C. §1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This federal statute authorizes lawsuits by injured parties for violations of constitutional and civil rights. Detention of juveniles in adult jails violates the juveniles' constitutional and civil rights in two ways. First, it constitutes punishment, and thereby violates the rehabilitative purpose of the juvenile court system and the "right to treatment" inherent in the due process requirements of the Fourteenth Amendment. Second, confinement in adult jails is so harmful to children -- physically, psychologically, and emotionally -- that it constitutes cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments.

(1) Rehabilitative Purpose of the Juvenile Court and the "Right to Treatment"

The foundation of the juvenile justice system is the goal of rehabilitation and the belief that children should not be subjected to the rigors of a criminal prosecution or to punishment by incarceration. Juvenile courts have always been considered to be social welfare agencies designed to

help children who have committed criminal acts or demonstrated socially unacceptable behavior. See, generally, Piersma, Ganousis and Kramer, "The Juvenile Court: Current Problems, Legislative proposals, and a Model Act", 20 St. Louis U.L.J. (1975); F. Faust and P. Brantington, Juvenile Justice Philosophy (1974); A. Platt, The Child Savers: The Invention of Delinquency (1969); Fox, "Juvenile Justice Reform: An Historical Perspective", 2 Stanford L. Rev.1187 (1970); Mack, "The Juvenile Court", 23 Harvard L. Rev. 104 (1909); Paulsen, "Kent v United States: The Constitutional Context of Juvenile Cases", 1966 Sup. Ct. Rev. 167.

The rehabilitative purpose of the juvenile justice system and the concomitant limits on procedural rights form the basis for a constitutional right to treatment for involuntarily institutionalized and detained children. The legal basis of the right to treatment is found in cases brought by individuals involuntarily committed to institutions for treatment claiming a "right" to such treatment, and conversely, claiming that individuals so committed who do not in fact receive treatment thereby suffer a violation of that right. The first discussion of the right to treatment is generally credited to an article by Dr. Morton Birnbaum in 1960. Birnbaum, The Right to Treatment, 46 A.B.A.J. 499 (1960). Dr. Birnbaum was particularly concerned about the unavailability of psychotherapy for mental patients committed to state hospitals for the ostensible purpose of treatment. He

proposed

> ...that the courts under their traditional powers to protect the constitutional rights of our citizens begin to consider the problem of whether or not a person who has been institutionalized solely because he is sufficiently mentally ill to require institutionalization for care and treatment so that he may regain his health, and therefore his liberty, as soon as possible; that the courts do this by means of recognizing and enforcing the right to treatment; and that the courts do this, independent of any action by any legislature, as a necessary and overdue development of our present concept of due process of law. Id. at 503.

Dr. Birnbaum did not explore the constitutional bases for the right to treatment, or the limits of the substantive right, in any depth. Instead, he argued generally that "substantive due process of law does not allow a mentally ill person who has committed no crime to be deprived of his liberty by indefinitely institutionalizing him in a mental prison." Id. He concluded that the writ of habeas corpus should be available to test the adequacy of treatment received in an individual case. Id.

In 1966, in Rouse v Cameron, 373 F.2d 451 (D.C. Cir. 1966), the United States Court of Appeals for the District of Columbia Circuit became the first federal court to recognize the right to treatment as a basis for releasing an involuntarily committed individual. Charles Rouse was an inmate at Saint Elizabeth's Hospital, where he was confined after being found not guilty by reason of insanity of carrying a dangerous weapon. He challenged his confinement through a habeas corpus

proceeding, claiming that his right to treatment was being violated because he had received no psychiatric treatment. Id. at 452. Chief Judge Bazelon, writing for a divided court, found that Congress had established a statutory "right to treatment" in the 1964 Hospitalization of the Mentally Ill Act, and remanded the case for further proceedings to determine whether Rouse had, in fact, received adequate treatment during his confinement.

More noteworthy than the statutory holding in Rouse was the court's discussion in dictum of the potential constitutional issues. The court stated

> Absence of treatment "might draw into question 'the constitutionality of [this] mandatory commitment section' as applied". Id. at 453 n. 6.

The court listed several ways in which confinement without treatment might violate constitutional standards. For example, where commitment is summary, without procedural safegaurds, such commitment may violate the individual's right to procedural due process. Id. at 453. In addition, the court noted that if Rouse had been convicted of the crime charged he could have been confined for a year at most. At the time of the decision, however, he had been confined for four years, with no end in sight. This differential in terms of periods of confinement may raise questions of due process of law, since it depends solely on need for treatment which allegedly was not met, as well as equal protection of the law. Id. Finally, indefinite confinement without treatment of

one found not criminally responsible, so inhumane as to constitute "cruel and unusual punishment." Id.

The Rouse decision provoked a considerable amount of discussion by legal commentators. See, e.g., Note, Civil Restraint, Mental Illness and the Right to Treatment, 53 Virginia L. Rev. 1134 (1967); Symposium, The Right to Treatment, 57 Georgetown L.J. 673 (1969); Symposium, The Right to Treatment, 36 U. Chicago L.Rev. 742 (1969). In 1971 in Wyatt v Stickney, 325 F. Supp. 781, aff'd sub nom. Wyatt v Aderholt, 502 F.2d 1305 (5th Cir. 1974) Chief Judge Johnson of the federal district court in Alabama went one step further than Rouse and held that patients involuntarily confined at Bryce Hospital, Tuscaloosa, Alabama, did, in fact, have a constitutional right to treatment:

> The patients at Bryce Hospital, for the most part, were involuntarily committed through noncriminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings. When patients are so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give them a realistic opportunity to be cured or to improve his or her mental condition... Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense." Id. at 784.

Judge Johnson's decision in Wyatt, which was affirmed by the Court of Appeals for the Fifth Circuit, generated a great deal of discussion by legal scholars and was followed by a

number of other courts. See, e.g., Developments in the Law - Civil Commitment of the Mentally Ill, 87 HARV.L.Rev. 1190 (1974) [thereinafter cited as "Developments"]; Gough, The Beyond -- Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox, 16 St. Louis U.L.J. (1971); Burnbaum, Reflections on the Right to Treatment, 23 ALABAMA L.REV. 623 (1971); Malakoff, Wyatt v. Stickney - A Constitutional Right to Treatment for the Mentally Ill, 34 U.PITT.L.REV. 79 (1972); Drake, Enforcing the Right to Treatment: Wyatt v. Stickney, 10 AM.CR.L.REV. 587 (1972; Note, Guaranteeing Treatment for the Committed Mental Patient: The Troubled Enforcement of an Elusive Right, 8 N.E.L.REV. 231 (1973); Schwitzgebel, Right to Treatment for the Mentally Disabled: The Need for Realistic Standards and Objective Criteria, 8 HARV.CIV.RTS.-CIV.LIB.L.REV. 513 (1973); Harris, Implementing the Right to Treatment for Involuntarily Confined Mental Patients: Wyatt v. Stickney, 3 N.M.L.REV. 338, (1973); Note, Adequate Psychiatric Treatment: A Constitutional Right?, 19 CATH.LAW. 322 (1973); Hoffman and Dunn, Beyond Rouse and Wyatt: An Administrative-Law Model for Expanding and Implementing the Mental Patient's Right to Treatment, 61 VA.L.REV. 297 (1975); Kenney, Civil Rights: The Federal Courts and the "Right to Treatment" Under 42 U.S.C. §1983 (1970), 27 OKLA.L.REV. 238 (1974); Bailey and Pyfer, Deprivation of Liberty and the Right to Treatment,

7 CLEARINGHOUSE REV. 519 (1974). See, e.g., Welsch v. Likins, 373 F. Supp. 487 (D.Minn. 1974), aff'd 550 F.2d 1122 (8th Cir. 1977); Davis v. Watkins, 384 F.Supp. 1196 (N.D. Ohio 1974); In re Ballay, 482 F.2d 648, 659 (D.C. Cir. 1973); Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 305 N.E. 2d 161, 350 N.Y.S.2d 889 (1973); Renelli v. Dept. of Mental Hygiene, 340 N.Y.S.2d 498, (1973); see also, Weidenfeller v. Kidulis, 380 F.Supp. 445, 451-52; (E.D.Wisc. 1974) 392 F.Supp. 967 (1975); Stachulak v. Coughlin, 364 F.Supp. 686,687 (N.D.Ill. 1973). Application of D.D., 118 N.J. Super. 1, 6, 285, A.2d 283, 286 (1971); Smith v. Wendell, 390 F.Supp. 260 (D.C.Pa. 1975); Lynch v. Baxley, 386 F.Supp. 378 (D.C.Ala. 1974); In re Jones, 338 F.Supp. 428 (D.D.C. 1972); Saville v. Treadway, 404 F. Supp. (M.D.Tenn. 1974). The Court in New York State Ass'n for Retarded v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) initially rejected the concept of a constitutional right to treatment in favor of an Eighth Amendment right for patients to be free from harm. The court ultimately recognized in a later opinion that "there is no bright line" separating the right to treatment, the right to care and the right to be free from harm. New York State Ass'n for Retarded v. Carey, 393 F.Supp. 715, 719 (E.D.N.Y. (1975). See also, Scott v. Plante, 532 F.2d 939 (3d Cir. 1976); Woe v. Matthews, 409 F. Supp. 419 (E.D.N.Y. 1976), aff'd sub nom. Woe v. Weinberger, 562 F.2d 40 (2nd Cir. 1977; Eubanks v. Clarke, 434 F.Supp. 1022 (E.D.Pa. 1977).

While Wyatt v. Stickney was being litigated, Kenneth Donaldson, a patient in the Florida State Hospital, sued his attending physicians and the superintendent of the facility on the grounds that he had been involuntarily confined for fifteen years without treatment. At trial the jury awarded Donaldson $48,000. On appeal, the Court of Appeals for the Fifth Circuit used Judge Johnson's language in Wyatt in holding that a patient has a "constitutional right to such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974), vac. on other grounds and remanded, 422 U.S. 563 (1975). When the Supreme Court heard the case, it did not address the broad issue of the right to treatment, but instead ruled unanimously on a single narrower issue in the case. The Court held that:

> ...[a] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. Id. at 576.

The "right to treatment" developed in cases involving persons involuntarily confined for mental illness applies with equal force to the confinement of children in jails.

> The United States Supreme Court has never definitively decided that a youth confined under the jurisdiction of a juvenile court has a constitutionally guaranteed right to treatment. But the Court has assumed, in passing on the validity of juvenile

> proceedings, that a state must provide treatment for juveniles. In Kent v United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed2d 84 (1966), the Court reversed the district court's conviction of a sixteen year old after the District of Columbia Juvenile Court had waived its jurisdiction. Justice Fortas there, writing for the Court, commented on the theory and practice of juvenile courts:
>
> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children. 383 U.S. at 556, 86 S.Ct. at 1054.
>
> Later, in In re Gault, supra, Justice Fortas "reiterate[d] the view" of Kent that the juvenile process need not meet the constitutional requirements of an adult criminal trial, but must provide essential "due process and fair treatment." this view has been continued subsequent to Gault in the Supreme Court decisions involving juvenile court procedures. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); McKeiver v Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed. 2d 647 (1971).

The rationales adopted by courts in finding constitutional bases for the right to treatment for juveniles have been as diverse as in the cases involving mental illness. Fourteenth Amendment procedural due process and substantive due process are two sources of the right to treatment for juveniles. As applied to juveniles, procedural due process demands that confinement within a system premised on rehabilitative treatment, as a result of a proceeding that does not provide all the procedural guarantees of a criminal prosecution, can only be justified by affording such treatment. This "quid pro quo"

rationale follows Judge Bazelou's lead in Rouse v. Cameron. Substantive due process, on the other hand, demands that within a system founded on the promise of rehabilitative treatment, even if full procedural rights have been accorded, the only justification for the deprivation of liberty of a person who has not been convicted of a crime is treatment. This argument rests on the rule enunciated by the United States Supreme Court: "At the least, due process requires that the nature and duration of commitment bear some reasonable relationship to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738, (1972). The decision in Wyatt v. Stickney relied on this rationale.

In Pena v New York State Division for Youth, 419 F. Supp. 203, 206-207 (S.D.N.Y. 1976), the court stated:

> Thus, considering the underlying assumptions of the above-cited Supreme Court cases and the outright assertions of those lower court cases cited, and considering, too, the recent Supreme Court decision regarding the right to treatment of persons civilly committed to mental health institutions, O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.ED.2d 396, 43 U.S.L.W. 4929 (1975), this court finds that the detention of a youth under a juvenile justice system absent provision for the rehabilitative treatment of such youth is a violation of due process rights guaranteed under the fourteenth amendment.

Accord, Martarella v Kelley, 349 F.Supp. 575 (S.D.M.Y. 1972) In re Savoy, 97 Wash.L.Rep. 1236 (D.C. App. 1970)

Both the procedural and substantive due process bases for a right to treatment for juveniles were recently accepted in a similar action:

> [J]uveniles who are involuntarily committed... have a constitutional right to individualized care and treatment to enable them to become productive members of society. The right is supported by two equally sound theories.
>
> First, where...the purpose of incarcerating juveniles in a state training school is treatment and rehabilitation, due process requires that the conditions and programs at the school must be reasonably related to that purpose. The Supreme Court made this clear in Jackson v Indiana, 406 U.S. 715...
>
> Second, the State...incarcerates juveniles without affording the full panoply of due process safeguards for delinquency adjudication hearings as are provided for adult criminal offenders... This denial of due process safeguards would be constitutionally impermissible unless the incarceration of juveniles serves beneficent, rather than punitive, purposes...
>
> For these reasons, the courts have held that due process requires that the incarceration of juveniles be for rehabilitation and treatment.

Morgan v Sproat, 432 F.Supp. 1130, 1135-36 (S.D. Miss. 1977).

In Gary W. v State of Louisiana, 437 F.Supp. 1209 (E.D. La. 1976), the court based its decision on the theory that the state may curtail a person's liberty in a noncriminal context only if there is rehabilitative treatment exchanged for the equivalent denial of liberty. In defining this trade-off the court concluded: "that quid pro quo is care or treatment of the kind required to achieve the purpose of confinement." 437 F.Supp. at 1216. The court recognized that a right to treatment exists and went on to discuss the right and the boundaries of the right. The court found that while there is a constitutional right to treatment, the proper treatment must be decided on an individual basis, stating:

> The constitutional right to treatment is a right to a program of treatment that affords the individual a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capacities permit with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency. What the constitution requires as the state's due to the individual it confines is a program that is proper for that individual.

437 F.Supp. at 1219.

Based on the assumption that procedural due process demands that treatment for juveniles be the quid pro quo for the lack of complete procedural safeguards, another federal court concluded that:

> [T]he constitutional validity of present procedural safeguards in juvenile adjudications, which do not embrace all of the rigorous safeguards of criminal court adjudications, appears to rest on the adherence of the juvenile justice system to rehabilitative rather than penal goals.
>
> Rehabilitation, then, is the interest which the state has defined as being the purpose of confinement of juveniles. Due process in the adjudicative stages of the juvenile justice system has been defined differently from due process in the criminal justice system because the goal of the juvenile system, rehabilitation, differs from the goals of the criminal system, which include punishment, deterrence and retribution. Thus due process in the juvenile justice system requires that the post-adjudicative state of institutionalization further the goal of rehabilitation.

Inmates of Boys' Training School v Affleck, 346 F.Supp. 1354, 1365 (D.R.I. 1972).

In Nelson v Heyne, 355 F.Supp. 451 (N.D. Ind. 1972) aff'd 491 F. 2d 352 (7th cir. 1974), the court addressed the broad issue of the right to rehabilitative treatment, finding

such a right guaranteed by the Indiana and United States Constitutions. The court concluded that the program of treatment appeared to consist more of form than substance and that the defendants had failed to provide minimal efforts.

Several other cases have also acknowledged a right to treatment under applicable state statutes and the United States Constitution. In deciding that the district court had improperly abstained, the Court of Appeals for the Second Circuit remanded a class action suit on behalf of children declared in need of supervision for further consideration to determine if their right to treatment had been denied. McRedmond v Wilson, 533 F.2d 757 (2d Cir. 1976). The court reaffirmed the existence of a right to treatment under the laws of the state of New York: "there is every indication that the state right to treatment is a mere counterpart of the federal due process clause as explicated in case law relied upon by the state's highest court." 533 F.2d at 764. The Supreme Court of New York had previously found that the right to treatment in this context does exist. Lavette M. v Corporation Counsel of the City of New York, 316 N.E. 2d 314 (N.Y. 1974); Matter of Ellery C. v Redlich, 300 N.E. 2d 424 (N.Y. 1973). See also, Creek v Stone, 379 F.2d 106 (D.C. Cir. 1967); Martarella v Kelley, 349 F.Supp. 575 349 F. Supp. 575 (S.D.N.Y. 1972); Lollis v Department of Social Services, 322 F.Supp. 473 (S.D.N.Y. 1970).

Moreover, in mandating rehabilitative treatment for involuntarily confined persons, federal courts have consistently

applied the long recognized principle that treatment must proceed in the least restrictive setting possible. This principle stems from the Supreme Court's decision in Shelton v Tucker, 364 U.S. 479 (1960):

> In a series of decisions, the court has held that, even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purposes.

Id. at 488 (footnote omitted).

The right to treatment in the least restrictive setting necessary to achieve the purposes of confinement is well established in the field of mental health, and is applicable to mentally ill or mentally retarded adults and juveniles who are involuntarily confined. Wyatt v Stickney, supra; Halderman v Pennhurst State School and Hospital, 446 F.Supp. 1295 (E.D. Pa 1977); Woe v Matthews, supra; Lynch v. Baxley, supra; Saville v Treadway, supra; Davis v Watkins, supra; Welsch v Likins, supra; Gary W. v Louisiana, supra; Eubanks v Clark, supra.

The doctrine has been found applicable because "[all] admissions to state facilities, be it through court commitment, or otherwise, entail an infringement of fundamental rights and freedoms." Halderman v Pennhurst State School Hospital, supra, 446 F.Supp. at 1319.

Many of the rights and freedoms encroached upon through confinement in the juvenile justice context are the same as those affected in the mental health field. Of course, the

predominant freedom lost is that of personal liberty. Other freedoms affected are freedom of speech, right to travel, and freedom of association. The Shelton case itself dealt with the freedom of speech and association. The Shelton doctrine has also been invoked in right to travel cases. See, e.g., Shapiro v Thompson, 394 U.S. 618, 633-38 (1969); Aptheker v Secretary of State, 378 U.S. 500, 512-14 (1964). Thus, the confinement of a juvenile entails an encroachment on "fundamental personal liberties," requiring the application of the Shelton doctrine of "less drastic means." Morales v Turman, 383 F.Supp. 53, 124 (E.D. Tex. 1974), rev'd and remanded, 535 F. 2d 864 (5th cir. 1976), rev'd and remanded, 430 U.S. 322 (1977), remanded 562 F.2d 995 (5th Cir. 1977).

A right to rehabilitative treatment is also implicit in Montana law. The purpose of the Youth Court Act is stated in section 41-5-102:

> The Montana Youth Court Act shall be interpreted and construed to effectuate the following express legislative purpose:
>
> (1) to preserve the unity and welfare of the family whenever possible and to provide for the care, protection and wholesome mental and physical development of a youth coming within the provisions of the Montana Youth Court Act;
>
> (2) to remove from youth committing violations of the law the element of retribution of and to substitute therefor a program of supervision, care, rehabilitation, and, in appropriate cases, restitution as ordered by the youth court;

In State ex rel. Palagi v. Freeman, Montana 132, 262 Pac 168 (1927) the Montana Supreme Court discussed the purposes and responsibilities of the Montana Juvenile Court system. The Court reversed an order placing a delinquent in the state industrial school. The lower court had denied a motion for a new trial on the theory that guilty pleas in juvenile court had the same effect as in a criminal proceeding, i.e., would allow a judge to make any disposition (regardless of parental fitness). The court found:

> "While section 12284, above, provides that 'appeals may be prosecuted as in other criminal cases,' proceedings against juvenile offenders are in no sense criminal proceeds; they do not contemplate punishment for the offense committed but the prevention of erring minors from becoming criminals. F.R.C.L. 981, and cases cited. The purpose of such statutes is to save children from prosecution and conviction on charges of crimes committed the state and to relieve them from the stigma attaching to conviction; to guard and protect them from themselves and evil-minded persons with whom they are in contact, including improper home influences and to train them mentally, morally and physically, when it appears that they are not receiving such training in the home. It is but an administrative police regulation for the saving of the child and the protection of society, and, in administering the law, the courts to which such administration is entrusted act more in a paternal than in a judicial capacity. [Cites omitted]. Id: at 170, 171.

In Matter of Geary, 172 Mont. 204, 562 P.2d 821 (1977) the court reversed the Freeman holding and held

instead that placement of a delinquent child in a foster home, unlike placement of a youth in need of supervision, does not require a finding of parental unfitness. Despite this change in statutory interpretation, the court reaffirmed the purpose of the statute as enunciated in Freeman:

> "Subsection (2) of section 10-1202 also expresses that this Act is concerned with the supervision, care and rehabilitation of the youth."
> 562 P.2d 824.

Thus, the Montana Code establishes a statutory scheme providing for the care, custody, treatment and discipline of juveniles under the jurisdiction of the state.

Several provisions of the Montana Code provide for the protection and treatment of juveniles. For example, §53-2-201(1)(b) provides that the Department of Social and Rehabilitative services shall "administer or supervise all child welfare activities, including importation and exportation of children; licensing and supervision of private and local child-caring agencies; the care of dependent, neglected, and delinquent children in foster family homes, especially children placed for adoption or those of illegimate birth. Under §41-3-403, the youth court or district court may issue orders granting such relief as may be required for the immediate protection of a youth. §41-3-201 et seq provides for the reporting of child abuse or neglect to the Department of Social and Rehabilition Services.

Several federal courts have ruled that state juvenile codes provide a statutory right to treatment for juveniles. In Creek v. Stone, 379 F2d 106 , 109-110 (D.C. Cir. 1967), a juvenile placed in a detention home prior to adjudication alleged that the home did not have facilities for the psychiatric care that he needed. After analyzing the language of the Juvenile Court Act, the Court of Appeals concluded that the Act "establishes not only an important policy objective but, in an appropriate case, a legal right to a custody that is not inconsistent with the parens patriae premise of the law."

The provisions of the D.C. Juvenile Court Act construed in Creek are very similar to those in the Montana Youth Court Act. The "construction and purpose" section of the D.C. Juvenile Court Act provides that:

> (3) When the child is removed from his own family, the court should secure for him custody, care and discipline as nearly as possible "equivalent to that which should have been given him by his parents. 16 D.C. Code §2316(3)(Supp. V, 1966).

The "Declaration Of Purpose" section of the Montana Youth Court Act asserts the following legislative purpose:

> (1) to preserve the unity and welfare of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of a youth coming within the provisions of the Montana Youth Court Act;
>
> (2) to remove from youth committing violations of the law the element of retribution and

in appropriate cases, restitution as ordered by the youth court;

(3) to achieve the purposes of (1) and (2) of this section in a family environment whenever possible, separating the youth from his parents only when necessary for the welfare of the youth or for the safety and protection of the community.

Because of the similarity of the statutes, the right to treatment found implicit in the D.C. statutory scheme, exists in the Montana statute as well.

Similarly, in Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), the Court of Appeals ruled that the Indiana Juvenile Court Act provided a statutory basis for the right to rehabilitative treatment. Id. at 360 n. 12. That case is particularly on point in the present circumstances since it was a class action for declaratory and injunctive relief, alleging violations of the constitutional rights of juveniles confined at the Indiana Boys School, including brutal corporal punishment and the improper and unauthorized use of tranquilizing medication. Clearly, then, under the laws of the State of Montana, the Juvenile court and the Department of Social Services have a statutory duty to provide needed treatment to juveniles within their jurisdiction, and the juveniles have a concomitant right to receive such treatment.

The concept of the "least restrictive setting" is also embodied in Montana law. Thus:

A youth taken into custody may not be detained prior to the hearing on the petition except when:

(a) His detention is required to protect the person or the property of others or the youth;

(b) he has pending court or administrative action, is awaiting a transfer to another jurisdiction and may abscond or be removed from the jurisdiction of the court;

(c) there are not adequate assurances that the youth will appear for court when required; or

(d) an order for his detention has been made by the court.

MCA §41-5-305.

The purpose of the Youth Court Act are to be achieved "in a family environment whenever possible, separating the youth from his parents only when necessary for the welfare of the youth or for the safety and protection of the community". MCA §41-5-102(3).

These provisions for the least restrictive setting gain particular significance in view of the fact that detention of juveniles in jails has specifically been held to violate the Fourteenth Amendment. Baker v. Hamilton, 345 F.Supp. 345 (W.D.Ky. 1972), was a class action brought by parents of two boys who were confined in Jefferson County Jail, Kentucky, for four days and four weeks respectively, against the sheriff, jail warden, and four juvenile court judges. The action was brought on behalf of the two boys and fifty-eight other boys who had been confined in the jail during 1971. After hearing expert testimony on the effects on juveniles of placement in the jail, and after personally visiting the jail, the court rules as follows:

> The Court is of the opinion that the present system used by the Juvenile Court Judge and his Trial Commissioners of selective placement of forty five juveniles in the Jefferson County Jail in pre-dispositional matters and of fifteen juveniles as a dispositional matter, even though these commitments be for limited periods of time, constitutes a violation of the Fourteenth Amendment in that it is treatment for punitive purposes the juveniles as adults and yet not according them for due process purposes the right accorded to adults. No matter how well in this respect they cannot be upheld where they constitute a violation of the fourteenth Amendment.

Indeed, in an early case considering the right to treatment, White v. Reid, 125 F. Supp. 647 (D.D.C. 1954), the petitioner was a juvenile who was being held in the District of Columbia jail as a result of an alleged parole violation. The court's decision was based on statutory grounds, but, in concluding that a juvenile who had not been waived by the juvenile court and tried as an adult could not properly be held in jail, the court noted:

> Unless the institution is one whose primary concern is the individual's moral and physical well-being, unless its facilities are intended for and adapted to guidance, care, education and training rather than punishment, unless its supervision is that of a guardian, not that of a prison guard of jailor, it seems clear a commitment to such institution is by reason of conviction of crime and cannot withstand an assault for violation of fundamental Constitutional safegaurds. Id. at 650.

In a similar case several years later, the same court again invalidated the detention of a juvenile in jail. Kautter v. Reid, 183 F.Supp. 352 (D.D.C. 1960). See also, Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967), and Fulwood v. Stone, 394 F.2d 939 (D.C. Cir. 1967). In Kautter, the district court held that since children have not been protected by the full mantle of

constitutional safeguards, "[t]o put such a child in a 'place for the punishment of crimes' whose 'customary occupants are persons convicted of crime or awaiting trial for crime' could, therefore, raise serious constitutional questions." 183 F. Supp. at 354.

Similarly, in Cox v. Turley, 506 F. 2d 1347 (6th Cir. 194), the court specifically addressed the pre-adjudication detention of juveniles in county jails. The court was specific in its conclusion. At 1352, the court held that, taken together, the jailers refusal to permit the boy to telephone his parents and the boy's confinement with the general jail population without a probable cause hearing, constituted cruel and unusual punishment in violation of the boy's rights under the Eighth Amendment to the Constitution. Furthermore, the court stated:

> The worst and most illegal feature of all these proceedings is in lodging the child with the general population of the jail, without his ever seeing some officer of the court. Id. at 1353.

(2) Detention of Juveniles in Adult Jails as Cruel and Unusual Punishment.

In Swansey v. Elrod, 386 F. Supp. 1138, 1142-1143 (N.D.Ill. 1975), the court summarized the critical factors in determining whether confinement constitutes cruel and unusual punishment:

> The meaning of cruel and unusual punishment is not fixed. As the Court stated in Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed. 2d 630 (1958):
>
> > "The [8th Amendment] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

> However, tests for cruel and unusual punishment have begun to emerge. The severity or harshness of a punishment should not offend the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." Jackson v. Bishop, 404 F2d 571 (8th Cir. 1968). Moreover, punishment cannot be disproportionate to the offense. See, e.g., Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910); Nelson v. Heyne, 491 F. 2d 352 (7th Cir. 1974).
>
> Under these standards courts have accorded juveniles a particularly high standard of care. For instance, this circuit has held that persons held under juvenile court jurisdiction are entitled to adequate rehabilitative treatment. Nelson v. Heyne, supra. Other courts have held that juveniles held under juvenile court jurisdiction cannot be mixed with adult prisoners. See e.g., White v. Reid, 125 F.Supp. 647 (D.D.C. 1954); Stinnett v. Hegstrom,178 F. Supp 17 (D.Conn. 1959). Contra United States ex rel Murray v. Owens, supra. The rationale for these decisions is that the high standard of care required is a quid pro quo for society's right to exercise its parens patriae control over juveniles in custody. In effect, the Supreme Court has held that a juvenile is entitled to a higher standard of custodial care in return for a more limited set of rights during the adjudication process under the due process clause. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

In that case, juveniles between the ages of 13 and 17 who had been confined in the Cook County, Illinois, jail pending prosecution brought a civil rights action against the sheriff and others, alleging that such incarceration constituted cruel and unusual punishment. The court heard expert testimony that the jail experience would cause a "'devastating, overwhelming

emotional trauma with potential consolidation of [these children] in the direction of criminal behavior.'" Id. at 1141. The expert testimony concluded that "the initial period of incarceration is crucial to the development of a young juvenile: if improperly treated the child will almost inevitably be converted into a hardened permanent criminal who will forever be destructive toward society and himself." Id. The court therefore concluded:

> Children between the ages of 13 and 16 are not merely smaller versions of the adults incarcerated in Cook County jail. As noted, the effect of incarceration in Cook County jail on juveniles can be devastating. At present these juveniles remain unconvicted of any crime and therefore must be presumed innocent. Although the Eighth Amendment does not mandate that this court become a super-legislature or super-administrator under these circumstances, the Court is not powerless to act. Under the Eighth Amendment children who remain unconvicted of any crime may not be subjected to devastating psychological and reprehensible physical conditions, and while other juvenile law cases are not strictly on point, they recognize that juveniles are different and should be treated differently. Thus, the evolving standards of decency that mark the progress of a maturing society require that a more adequate standard of care be provided for pre-trial juvenile detainees. Plaintiffs therefore have demonstrated that there is a likelihood of success on their Eight Amendment claim.

Id. at 1143.

In Baker v. Hamilton, supra, the court also concluded that the detention of juveniles in adult jails constitutes cruel and unusual punishment. The court's discussion is particularly significant because many of the conditions present in the Jefferson County jail case are also present in jails in rural Colorado.

We come now to the question of whether or not the commitment of the sixty juveniles referred to above in 1971 constituted a violation of the Eighth Amendment of the United States Constitution. The Court reaches the conclusion that such confinement does violate the Eighth Amendment and relies upon the case of Jones v. Wittneberg, supra. In Jones, Judge Young referred to the conditions in the Lucas County Jail as follows:

> "we may suppose that the constitutional provision against cruel and unusual punishment was directed against such activities. In any event, when the total picture of confinement in the Lucas County Jail is examined, what appears is confinement in cramped and overcrowded quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts, except with others in the same subhuman state, no exercise or recreation, little if any medical attention, no attempt at rehabilitation, and for those who in despair or frustration lash out at their surroundings, confinement, stripped of clothing and every last vestige of humanity, in a sort of oubliette."

Jones held that confinement in the Lucas County Jail as adults violated the Eighth Amendment. This Court realizes that conditions in the Jefferson County Jail are not as bad as the Lucas County Jail and that the officials of Jefferson County are making substantial efforts to improve conditions, but is of the opinion that there are sufficient elements present in the Jefferson County Jail to hold that confinement therein as to juveniles constitutes cruel and unusual punishment. Specifically, these elements are as follows--cramped quarters, poor illumination, bad circulation of air, broken locks, no outdoor exercise or recreation, and no attempt at rehabilitation, in addition to the condition of the "hole," which Judge Thompson described as horrible.

345 F.Supp. at 352-353. 8/

8/ cf. State ex rel. R.C.F. v. Wilt, 252 S.E.2d 168 (W.Va. 1969); State ex rel. C.A.H. v. Strickler, 251 S.E. 2d 222 (W.Va. 1979)

Moreover, juveniles who are victims of assaults by other inmates may sue for violation of their right to be reasonably protected from violence in the facility. Several courts have held that confinement which subjects those incarcerated to assaults and threats of violence constitutes cruel and unusual punishment. See e.g., Penn v. Oliver, 351 F.Supp. 1292 (E.D.Va. 1972); Cox v. Turley, 506 F.2d 1347 (6th Cir. 1974); Holt v. Sarver, 309 F.Supp 362 (D.D.Ark. 1970), aff'd 442 F.2d 304 (8th cir. 1971); Gates v. Collier, 349 F.Supp. 881 (N.D. Miss. 1972); Brown v. United States, 486 F.2d 284 (8th Cir. 1973); Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973); Bethea v. Crouse, 417 F.2d. 504 (10th Cir. 1969); Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971); Kish v. Milwaukee, 48 F.R.D. 102 (E.D. Wis. 1969), aff'd 441 F.2d 901 (7th Cir. 1971).

If juveniles are separated from other inmates in jails and kept in isolation, in order to protect them from assaults, the children may nevertheless suffer such sensory deprivation and psychological damage as to violate their constitutional rights. In Lollis v. New York State Dept. of Social Services, 322 F.Supp. 473 (S.D.N.Y. 1970), the court found that the isolation of a 14-year old girl in a bare room without reading materials or other form of recreation constituted cruel and unusual punishment. The court relied on expert opinion that such isolation was "'cruel and inhuman'" Id. at 480.

(3) 42 U.S.C. §1988

This statute provides as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication,

> shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

The statute is intended to provide a federal remedy where existing federal law is inadequate or deficient, by adopting and incorporating the law of the state in which the federal court sits. Thus, even if it were held that the Juvenile Justice and Delinquency Prevention Act does not create a private right of action against local and state officials by individual juveniles confined in adult jails, a child detained in an adult jail in Montana could still sue local and state officials in federal court through 42 U.S.C. §1988, by adopting and incorporating the substantive provisions of the Montana Youth Court Act, which prohibit confinement of juveniles in adult jails. The statute, 42 U.S.C. §1988, does not confer any substantive rights on individuals; rather, it is a hollow vessel which is "filled" by state substantive law. The sole function of 42 U.S.C. § 1988 is to provide access to federal courts for persons whose civil rights are violated, where the civil rights are recognized by state law but not federal law. In the

leading case of Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), the court described the function of §1988 as follows:

> Thus §1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available, not because it is procedure rather than substance, but because Congress says so.

Id. at 409.

A substantial number of courts have utilized §1988, often in conjuction with §1983, to fashion remedies for civil rights inadequately protected by federal law but adequately covered by state law. See, e.g., Jenkins v. Averett, 424 F.2d 1288 (4th Cir. 1970) (federal court may resort to the state law of torts to supply the elements of §1983 claim); Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973) (state law applied to hold sheriff liable for assaults committed by temporary law enforcement officers acting under his supervision); Johnson v. Greer, 477 f.2d 101 (5th Cir. 1973) (state law applied to hold administrator of psychiatric diagnostic clinic liable for false imprisonment of plaintiff); Hall v. Wooten, 506 F.2d 564 (6th Cir 1974) (state law applied to allow maintenance of lawsuit against county jail officials for death of county prisoner, who was brutally murdered by drunken fellow inmates).

C. State Tort Liability

As indicated earlier, local and state officials may incur

liability under state tort law for injuries received by juveniles confined in adult jails, whether the injuries arise from the conditions of confinement in the jail or from assaults by other inmates. The general standard for tort liability was stated by the Supreme Court of Montana in Pretty on Top v. City of Hardin, Montana,___, 597P.2d. 58 (1979). In that case, the widow of a deceased prisoner of the city jail brought an action against the city and the police chief to recover damages arising out of the prisoner's suicide. The court stated the general standard of care: "A jailer owes a duty to the prisoner to keep him safe and to protect him from unnecessary harm. Reasonable and ordinary care must be exercised for the life and health of the prisoner." [Emphasis in original] 597 P.2d. 60.[9/]

The court in Pretty on Top supported the enunciated standard by citing Porter v. County of Cook, 42 Ill. App. 3d 287, 355 NE 2d 561 (1976). In that case, the plaintiff was incarcerated for threatening to harm his wife. He was examined by a psychiatrist who recommended that he be immediately admitted to a hospital as an emergency for protection from physical harm to himself or others. Instead, he was placed in an isolated cell where he set his mattress on fire in an attempt to drive away threatening voices, after yelling for help and medication from

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9/ In Pretty on Top, however, the duty of care was met because there was no evidence to show that the proximate cause of the prisoner's suicide was anything but the intentional act of the prisoner.

the guards. His hair caught on fire and he suffered severe burns. The Appellate Court of Illinois upheld the trial court's factual determination that the county, which was obligated to provide reasonable care for its prisoners, did not do so when its employees failed to strip the defendant, take away his personal effects, and prevent him from harming himself.

The Pretty on Top court also cited approvingly Kendrick v. Adamson, 51 Ga. App. 402, 180 S.E. 647 (1935): "A sheriff owes to a prisoner placed in his custody a duty to keep the prisoner safely and free from harm, to render him medical aid when necessary and to treat him humanely and refrain from oppressing him."

An official having custody of another person must attempt in good faith to exercise the duty of care owed to that person.

In Richard v. Parodis, 167 Montana 450, 539 P2d 718 (1975), the Supreme Court of Montana set aside a summary judgment in favor of defendants sheriff and his deputy. The plaintiffs had been shot while near the site of a melee which peace officers were attempting to control and brought an action for personal injuries. In reversing, the court held that there were genuine issues of material fact as to whether the plaintiff was shot by the deputy, whether his action was reasonable under the circumstances and whether his actions were done in a good faith attempt to being the melee under control. Implicit in this ruling is the rule that for an official to incur liability, she/he must be guilty of some conduct which transcends the bounds of good faith performance of her/his duty.

The duty of care owed by a sheriff to a prisoner applies to

a juvenile held in the jail, as well as to an adult.

It appears that a sheriff who confines a child in an adult jail may well be held liable for injuries sustained by the child as a consequence of that confinement. This is so for two reasons. First, confinement of a child in an adult jail may transcend the bounds of good faith performance of the sheriff's duty, since it is directly contrary to state law to hold juveniles in most situations, as was discussed earlier in this memorandum. (see p. supra). A sheriff cannot be acting within his duty in confining a child in an adult jail if state law specifically prohibits such confinement. Second, it is so widely acknowledged that confinement of juveniles in adult jails is seriously harmful to such juveniles, as also discussed earlier, that the sheriff knows or should know that such confinement would result in injury to the child.

With respect to sheriffs, an analysis in terms of tort law concepts would be as follows. In order to establish liability, an injured juvenile would be required to prove that the sheriff was negligent for confining him in the jail, and that the negligence of the sheriff was the proximate cause of the juvenile's injuries. The sheriff's violation of the clear statutory mandate, however, would be negligence per se,[10/] and since it would be

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10/ Once the statute is determined to be applicable -- which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation -- the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence, and that the court must so direct the jury. The standard of conduct is taken over by the court from that fixed by the legislature, and "jurors have no dispensing power by which to relax it," except in so far as the court may recognize the possibility of a valid excuse for disobedience of the law. This usually is expressed by saying that the unexcused violation is negligence "per se," or in itself. Prosser, Handbook of the Law of Torts, 200 (4th ed. 1971)

reasonably forseeable that a child confined in an adult jail would suffer emotional, psychological or physical injuries, the sheriff's negligent act in confining the child in the adult jail would be a proximate cause of the injuries. Thus, a sheriff who confines a juvenile in an adult jail appears to be extremely vulnerable to a lawsuit for damages on behalf of the juvenile.

It is more difficult to determine whether other officials, such as county commissioners, could be held liable in tort for injuries sustained by a juvenile incarcerated in an adult jail. Since the county commissioners are specifically charged by state law with the responsibility for carrying out the provisions of the Youth Court Act, including detaining juveniles, subject to specific limitations (MCA §41;5-104), and for maintaining the county jail (MCA §7-32-2201 & 2204), their failure to provide appropriate facilities for juveniles or to protect the health and safety of jail inmates, would be in dereliction of their duties under state law and therefore negligent (and perhaps also wilful).

In Smith v. Zimmer, 45 Mt. 282, 125 Pac 420(1912), the court addressed the issue of the liability of county commissioners for an automobile accident resulting from lack of road repair. In discussing the liability of the supervisor and the board, the court stated:

> Clearly the supervisor is liable under the provision of §1372, supra, for under it, when an emergency arises calling for action, his duty is made imperative. So, also, when through his dereliction conditions of which the members of the board must have notice are

> permitted to continue, imperiling the safety of the citizen, the obligation is upon them to act; in other words, to see that their appointee, the supervisor, or one appointed in his stead, discharges his official duty. 125 Pac 426. 11/

Establishing proximate cause, however, would appear to be more difficult, since the county commissioners do not have direct authority over specific juveniles detained in the jails. The Montana Supreme Court affirmed a motion for nonsuit in O'Brien v. Stromme, 54 Mt. 221, 169 P.3d (1917), stating "No more than any one else can public officers be held to respond for injuries until it is shown that their fault is the proximate cause of such injuries" 169 P.37.

While proximate cause must be established to hold an official responsible, the subsequent negligence of another official does not eradicate the liability of the first tortfeasor. The standard regarding intervening causes is set forth by the Montana Supreme Court in Halsey v. Uithof, 166 Mt. 319, 532 P.2d 686 (1975). In this case a disabled truck was the initial cause of the plaintiff's injury, suffered while trying to pass the truck. But other cars approaching at unreasonably high speeds and without braking upon approach were held to be unforseeable and therefore intervening superceding causes. Citing another leading case, Beopple v. Mohalt, 101 Mt. 417, 54 P.2d 857, the court stated at 690:

11/ This decision was reversed on hearing on other grounds, i.e., there was no actual notice of the defect given to the board as a whole.

> We agree with the proposition that where one has negligently caused a condition of danger, he is not relieved of responsibility for damage caused to another merely because the injury also involved the later misconduct of someone else. But, this is true only if both negligent acts are in fact concurring proximate causes of the injury and it is not true if the later negligence is an independent, intervening sole cause of the accident.

Thus, an official's liability remains so long as the subsequent negligence of another was foreseeable. The federal district court, applying Montana law in Jimison vs. U.S. 267 F.Supp. 674, 678 D. Mont (1967), stated:

> If the intervening act of the third person is forseeable or a normal consequence of the situation created by the actor's conduct, it is generally not a superceding cause of harm to the person injured.

The parameters of forseeability are set forth in Deeds v. U.S. 306 F.Supp 348 D. Mont. (1969), another federal court case applying Montana law. The specific injury need not be anticipated. Citing Reino v. Montana Mineral Land Development Co., 38 Mont. 291, 295, 296, 99 P. 853, 855 (1902), the court stated at 361:

> The Montana court has never required that the "specific inquiry" which occurred be "specifically anticipated as the natural and probable consequence of the wrongful act. It is sufficient if the facts and circumstances are such that the consequences attributable to the wrongful conduct charged are within the field of reasonable anticipation; that such consequences might be the natural and probable results thereof, though they may not have been specifically contemplated or anticipated by the person so causing them."

The court found that a U.S. airforce base employee who sold and served liquor to a minor when the defendant knew his customer was drunk and would have to drive home was negligent because he could reasonably forsee an accident. The minor's drunkenness and

speeding did not eradicate the initial proximate cause.

Thus, the fact that the sheriff is the one who directly places a juvenile in an adult jail does not appear to insulate other officials, with indirect supervisory power and responsibility, from liability. Since their action in failing to provide adequate detention facilities is contrary to state law, they are also acting wrongfully, and since the injuries to juveniles are foreseeable, they may be held liable in damage actions.

It should also be noted that state tort claims could be joined with federal civil rights claims in lawsuits filed in federal court, under the doctrine of "pendant jurisdiction," United Mine Workers of America v. Gibbs, 383 U.S. 175 (1966), since the state and federal claims would "derive from a common nucleus of operative fact." Id. at 725. Thus sheriffs or county commissioners could be sued in federal court for violations of federal law, the Juvenile Justice & Delinquency Prevention Act and the federal Civil Rights Act, 42 U.S.C. §§1983, 1988, and could be sued in the same action for negligence under state law.

IV. IMMUNITY OF LOCAL AND STATE OFFICIALS

A. Immunity Under State Law for Personal Injuries

In 1975, Art II §18 of the Montana Constitution was passed, thereby abolishing sovereign immunity. It states:

> The state, counties, cities, towns and all other local governmental entities shall have no immunity from suit for injury to a person or property except as may be especially provided by law by a 2/3 vote of each house of the legislature.

This constitutional provision is reinforced by MCA §2-9-102. Thus, unless limited by specific legislation, the state can be sued for the negligence of its officers and employees. Existing statutes prohibit state liability for acts of county commissioners (MCA §2-9-111(2)), of town board members (MCA §2-9-114) and of judges (MCA §2-9-112(1)). In addition to statutory immunity, courts recognize state immunity for acts of public officials where the public need weighs heavily in favor of such a policy. State ex rel Dept. of Justice v. District Court, 560 P2d 1328, 33 St. Rep. 1242 (1976) (attorney general). However, courts have been very reluctant to extend immunity in light of the strict limits expressed in the constitution and statutes. A city has been held liable for the negligence of police officers acting within the scope of their duties. State v. District Court, 550 P.2d 382,33 St. Rep. 464 (1976). The state has been held liable for tortious acts of its game wardens. Orser v. State ___Montana___, 582 P.2d 1227. Law enforcement officers such as sheriffs and probation officers do not appear to constitute an exception to general state liability.

That some governmental entities are immune from liability does not mean that individual government officials are immune. On the contrary, government officials are immune, if at all, only so long as they are acting within the normal scope of their duties. "When a public offiers goes outside the scope of his duty, he is not entitled to protection on account of his office, but is liable for his acts like any private individual"

Heiser v. Severy, 117 Mont. 105, 158 P.2d 501 (1945). The qualified immunity of legislators is set forth in MCA §2-9-111(3):

> A member, officer, or agent of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by the legislative body. (emphasis added)

The qualified immunity of judges is set forth in MCA §2-9-112(2)

> A member, officer, or agent of the judiciary is immune from suit for damages arising from his lawful discharge of an official duty associated with judicial actions of the court. (emphasis added)

Similar qualifications apply to the immunity of the elected executive officer of a local governmental entity.

The purpose of these qualified immunity provisions is discussed by the Montana Supreme Court in Rickard v. Paradis, 167 Mont. 450, 539 P.2d 718 (1975) (negligence alleged in performance of duties as public peace officers) at 720:

> The qualified immunity of public officers from liability for torts committed in the performance of their duties ... involves the personal liability of such officers, not the liability of the governmental entity they serve. The basis for such qualified immunity rests on different policy considerations. Its purpose is not to protect public officers from the consequences of their wrongful acts, but to facilitate the proper operation of government by protecting public officers in the discharge of their duties where they act honestly and in good faith. Prosser, Law of Torts, 4th Ed. P.989 & Cases listed in Footnote 96.

Honesty and good faith appear to be requirements for the immunity provision. Since incarceration of juveniles in adult

jails is prohibited except in specific, limited situations, by state statutes, such incarceration is neither within the "lawful discharge of an official duty" nor in good faith. Accordingly, both government officials covered by qualified immunity statutes and those who are not covered, can be held liable for injuries resulting from their illegal confinement of juveniles in adult jails.

B. Immunity Under Federal Law for Violation of Civil Rights

1. History of Sovereign Immunity

Current doctrines of sovereign immunity arose from the struggles for power in feudal England. There was an ancient English tradition that "the King can do no wrong, and thus could not be sued on any ground." Since the judges at the time were agents of the King, they, too enjoyed absolute immunity. For its part, the English Parliament in 1688 conferred immunity upon itself in the Bill of Rights, in order to protect its independence from the King. See generally, Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 N.Y.U. L. Rev. 526 (1977).

In the following discussion, it is important to remember that any applicable immunity generally only protects a public official from liability for damages: with few exceptions, public officials are not immune to lawsuits for declaratory and injunctive relief.

2. Immunity of Judges, Prosecutors, and Legislators

As a practical matter, judges, prosecutors, and legislators enjoy virtually absolute immunity from liability for

damages for acts done in the performance of their official duties. Recent Supreme Court cases demonstrate the extensive breadth of this immunity. In Stump v. Sparkman, ____ U.S.____, 98 S.Ct. 1099 (1978), an Indiana circuit court judge approved a petition by the mother of a fifteen-year-old girl to have her daughter sterilized. The girl went to the hospital ostensibly to have her appendix removed; in fact, a tubal ligation was performed. No hearing was held on the petition, and no one was appointed to represent the interests of the girl, who was never told the nature of the operation to be performed on her. She learned of the sterilization only after she got married and attempted to have children. Nevertheless, the Supreme Court ruled that a judge enjoys absolute immunity unless the act done is "in clear absence of all jurisdiction" or is non-judicial in nature. Since Indiana law gave circuit judges jurisdiction to act upon petitions for sterilization, the Supreme Court ruled that the judge could not be held liable.

Similar principles apply to legislators and prosecutors. In Tenney v. Brandhove, 341 U.S. 367 (1951), Brandhove had circulated a petition in the California legislature opposing the Tenney Committee on Un-American Activities. The Committee called Brandhove as a witness, and prosecuted him when he refused to testify. In Brandhove's lawsuit against members of the Committee for violating his Constitutional rights, the Supreme Court ruled that legislators could not be held liable for their official acts, even when they used the legislative

process to punish the exercise of First Amendment rights. In Imbler v. Pachtman, ___ U.S. ___, 96 S.Ct. 984 (1976), the Court upheld immunity of a prosecutor who knowingly used perjured evidence. In addition, administrative agency officials such as hearing examiners and administrative law judges, who perform functions analogous to judges and prosecutors, also enjoy absolute immunity.

By the same token, when judges, legislators, and prosecutors act outside of their official realm, they do not enjoy immunity from liability. Courts have held judges liable where they issued orders that were not authorized by state law, interfered with judicial proceedings after being disqualified, assaulted a person in their courtroom, or performed legislative or administrative (as opposed to judicial) functions. In the latter situation, a qualified "good faith" immunity applies, rather than absolute immunity.

Similarly, courts have held that the following activities are not legislative in nature: distributing to the public materials gathered by a legislative committee, accepting bribes in return for votes, using illegal or arbitrary personnel hiring practices, and enforcing or executing illegal legislative bills. The immunity which applies to legislators also applies to their aides and employees for legislative action which would be protected if performed directly by the legislator. On the other hand, quasi-legislative officials such as county commissioners or city council members are generally accorded only a qualified, "good faith" immunity similar to that enjoyed by executive

officials, as discussed below.

3. Immunity of Executive Officials

The courts have applied different types of immunity to executive officials, depending upon the nature of the wrong which they are accused of doing. In Barr v. Mateo, 360 U.S. 564 (1959), employees of the Federal Office of Rent Stabilization sued their superior for libelous statements contained in a press release which he had issued. The Supreme Court held that a low-level federal administrative official who has been sued for defamation is absolutely immune from liability. Since Barr, the lower federal courts have extended the decision, conferring absolute immunity on federal executive officials for virtually all tort actions based on "discretionary" acts.

When government officials are accused of violating the constitutional rights of others, however, they enjoy only a qualified, or limited, immunity. In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Governor of Ohio and other high state officials were accused of unnecessarily deploying National Guard troops at Kent State University, and thereby "intentionally, recklessly, willfully, and wantonly" violating the rights of four students who were killed in the resulting confrontation. The Supreme Court noted that there is leeway in the law for public officials to make mistakes:

> Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity -- absolute or qualified --

> for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Moreover, the Court stated that high officials are allowed more leeway than subordinates: the higher the official position, the broader the range of duties and responsibilities of the official, and the greater the scope of allowable discretion.

The qualified immunity of an executive official, therefore, depends upon the particular position the official holds and the circumstances occurring at the time of the official acts. The Supreme Court described the immunity as follows:

> These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in the light of all circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in course of official conduct.

In Wood v. Strickland, 420 U.S. 308 (1975), a civil rights case brought by public high school students who claimed that they were expelled from school in violation of their constitutional rights, the Supreme Court clarified its description of limited executive immunity in terms that may be more easily understood. Although the specific holding of the case relates to school board members, the standard for immunity should apply to other executive officials as well:

> ...[W]e hold that a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law."...A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Thus, there are two critical questions after Wood v. Strickland: whether the official acted with malice, and whether the official's actions were reasonable in light of the information available and the existing state of the law. If the official acted with malice toward the plaintiff, or if the official's actions were unreasonable in light of the available information and the state of the law, there is no immunity. Good faith must be proven, and the burden of proof is on the official asserting the immunity. Skekan v. Board of Trustees of Bloomsburg State College, 528 F.2d 53 (3rd Cir. 1976); Zweibon v. Mitchell, 516 F.2d 594, 671 (D.C. Cir. 1975) (en banc).

Lack of malice does not in itself establish good faith. A refusal to do what one knows or should know is legal because of a fear of the repercussions does not justify the conduct. Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975) (refusal to hire racially mixed couple as live-in counselors at state mental facility not because of personal discriminatory motive, but due to concern

about adverse reactions of visitors and state legislators no defense to damage claims); Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975) (dismissal of students from positions as editors of school newspaper not to stifle content of articles, but because of poor grammar in articles and the effect of that poor grammar on the school reputation no defense to damage action).

In addition, failure on the part of an official to take appropriate steps to avoid the injury complained of may defeat a "good faith" defense to a damage action even if the official did not act out of malice or ill will. Bryan v. Jones, 530 F.2d 1210, 1215 (5th Cir. 1976) (individual imprisoned for one month due to recordkeeping error). Also, lack of good faith may be inferred from inaction or failure to act. Sims v. Adams, 537 F.2d 829 (5th Cir. 1976) (failure of mayor and police chief to control police officer with known propensity for violence); Harris v. Chanclor, 537 F.2d 203 (5th Cir. 1976) (failure of jailer to intervene in beating by police officer of prisoner in his custody); Downie v. Powers, 193 F.2d 760 (10th cir. 1951).

In view of the explicit prohibitions on confinement of juveniles in adult jails contained in state and federal statutes, it is unlikely that local officials in Montana could make out a "good faith" defense for such illegal incarceration.

4. Immunity of Local Governmental Entities

The Supreme Court initially held, in Monroe v. Pape, 365 U.S. 167 (1961), that municipal bodies were not "persons" who could be held liable under the Civil Rights Act of 1871, 42 U.S.C. § 1983. However, in Monell v. Department of Social

Services of the City of New York, ___ U.S. ___, 98 S.Ct. 2018 (1978), the Court overruled Monroe v. Pape and held that local government units do not have an absolute immunity from liability. Thus, local government bodies including cities, towns, police departments, and city agencies, can be sued directly under §1983 for money damages or declaratory or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers, or where the action constitutes governmental "custom," even though such a custom has not received formal approval through the body's official decision-making channels.

The Court imposed one limitation on the doctrine it announced in Monell: a municipality cannot be held liable solely because it employs a person who causes harm to another, on a respondeat superior theory. Thus, the basis for liability must be an official act, declaration, or custom; the municipality cannot be held liable merely because one of its employees does something which hurts someone else.

5. Liability of Public Officials and the Eleventh Amendment

In 1798, Congress passed the Eleventh Amendment, which prohibits suits against the states by citizens or by foreign countries. In Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court held that where a lawsuit names a state official as a defendant and seeks money damages on restitution that will be paid out of the state treasury, such relief is in effect a suit against the state itself, and is therefore barred by the

Eleventh Amendment.

There are several points to remember in considering the effect of the Eleventh Amendment on litigation against public officials. First, injunctive relief, as opposed to money damages, is not barred by the Eleventh Amendment, even if it requires significant expenditure of state funds. Second, the Eleventh Amendment only bars money awards which are paid out of the state treasury. There is no bar to restitution or damage awards which would come out of different funds. Finally, state officials are usually sued both in their official capacities and in their individual capacities. A judgment against an official in his individual capacity must be paid by the individual, not the state, and therefore is not barred by the Eleventh Amendment, Clegg v. Slater, 420 F.Supp. 910 (W.D. Okla. 1976); Scheuer v. Rhodes, 416 U.S. 232 (1974).

C. The Montana Statutes Limiting Liability of the State and its Officials Do Not Provide Immunity for Local and State Officials from Federal Civil Rights Claims

In Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), defendant public officials appealed from an award of damages in a §1983 civil rights action for denial of tenure and dismissal of plaintiff junior college teacher in a manner which allegedly denied plaintiff's right to free speech and due process. While it held defendant Board of Education immune from liability for damages by the doctrine of governmental immunity, the Court of Appeals affirmed the trial court's award of actual and punitive damages against defendants. In applying the doctrine of official privilege the court observed:

> Thus the rule [of official privilege] must be here recognized and applied, It is one which has been formulated and used in the federal courts; it must be a 'federal' one because the federally created cause of action [§1983] cannot be restricted by state laws or rules relating to sovereign immunity nor to official privilege. Id. at 341.

In Hampton v. City of Chicago, Cook County, Illinois, 484 F.2d 602 (7th Cir. 1973), the court held:

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 or §1983(3) cannot be immunized by state law. Id. at 607.

Plaintiffs alleged that 14 Chicago police officers and 15 other public officials had engaged in a conspiracy to deny their First Amendment rights as members of the Black Panther Party by illegal and forced entry of their apartment and the unjustifiable use of excessive and deadly force and by malicious prosecution. The trial court had relied on the Illinois Tort Immunity Act to dismiss the claims against the 15 public officials, including states attorneys who assisted in the planning and execution of the police raid. The Court of Appeals held that such reliance was misplaced:

> A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See McLaughlin v. Tilendis, 398 F.2d 287, 290 (7th Cir. 1968). The immunity claim raises a question of federal law. Id. at 607.

D. Indemnification of Local and State Officials

Montana law provides that public officers and employees who are sued for actions (other than intentional torts or felonious

acts) within the course and scope of their employment, are indemnified by the governmental entity employer for any money judgments or legal expenses to which they may be subject as a result of the suit. MCA §2-9-305(4).

Local and state officials who are sued for confinement of juveniles in adult jails probably may not enjoy the benefits of the indemnification statute. Since such activity is expressly prohibited by state law, such confinement is not within the legitimate scope of the official's public employment. Therefore these officials may be held personally liable for money judgments.

Some doubt is cast on this interpretation of the indemnification statute by a case which substantially predates the statute (which was passed in 1973, amended in 1974). In Erickson v. Anderson, 77 Mont. 517, 252 P. 299 (1926), a minor sued the chief of police personally and in his official capacity as well as the surety on his official bond, for damages allegedly suffered from an illegal arrest and false imprisonment. The surety company appealed the judgment for the plaintiff. The bond was conditioned on the chief's performing all official duties well, truly and faithfully. Though the chief acted without authority of law or just provocation, the surety was held responsible for the torts committed. In reviewing the law, the court stated at 300:

> ...the later decisions hold that the surety on an official bond is liable for both acts of nonfeasance and misfeasance of an officer

> assuming to act officially, whether at the outset vested with authority to act in some manner, or acting entirely without authority, but relying upon his official position to enable him to commit the act. [cites omitted].
>
> It would seem from a reading of the decisions that this court has always inclined toward this later doctrine (cites omitted].

Whether this broad definition of the bond provisions (regarding "official duties") would also be applied to the statute's language is unclear. It does seem likely, though, that a court would pay more deference to the facial meaning of statutory language than to contractual terms on a bond. The result of this likely interpretation is that the individual official, rather than the surety, would be liable for a tort judgment.